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# THE JAG JOURNAL

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ARTICLES & COMMENTARY

**"IF A TREE FALLS IN THE FOREST . . .": PUBLICATION AND DIGESTING POLICIES AND THE POTENTIAL CONTRIBUTION OF MILITARY COURTS TO AMERICAN LAW**
*Eugene R. Fidell*

**THE IRANIAN HOSTAGES CRISIS: INTERNATIONAL LAW AND UNITED STATES POLICY**
*MAJ James P. Terry, USMC*

**BLUEJACKET DIPLOMACY: A JURIDICAL EXAMINATION OF THE USE OF NAVAL FORCES IN SUPPORT OF UNITED STATES FOREIGN POLICY**
*CDR Dennis R. Neutze, JAGC, USN*

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*Office of the Judge Advocate General*
*Department of the Navy*
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READEX FICHE

# "If a Tree Falls in the Forest . . .": Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law

*Eugene R. Fidell**

*With the demise of the* Court-Martial Reports, *the advent of the Military Justice Reporter as an element of the National Reporter System, and the publication of a* Shepard's Citations *for military cases, important steps were taken toward the integration of military jurisprudence with the larger body of American criminal law. In this article, Mr. Fidell suggests that these steps may not be as effective as one would have hoped because of deficiencies in the digesting arrangements, and urges a reexaminaton of those arrangements as well as the policy with respect to publication of military appellate cases. Improvements in these areas could help foster increased interaction between the military and civilian legal systems.*

## I. Introduction.

Sweeping reviews of the military justice system resemble, in some ways, bamboo or locusts: they come in cycles. Every so often, one law review or another awakens to the fact that there is such a system, and accepts a major article or publishes a symposium issue[1] or, more likely, an

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* *LeBoeuf, Lamb, Leiby & MacRae, Washington, D.C. B.A., Queens College 1965; LL.B., Harvard University 1968.* *The author is indebted to Irene C. Carstens for her assistance in the preparation of this article, and to Alan J. Chaset for his thoughtful comments on a draft.*

1. *E.g., United States Court of Military Appeals: A Review of the 1975-76 Term,* 52 Ind. L. J. 151 (1976); *Symposium, Military Law,* 10 Am. Crim. L. Rev. 1 (1971); *Justice in the Military,* 22 Me. L. Rev. 1 (1970); *The Uniform Code of Military Justice—Its Promise and Performance (The First Decade: 1951-61), A Symposium,* 35 St. John's L. Rev. 197 (1961); *A Symposium on Military Justice,* 6 Vand. L. Rev. 161 (1953). For obvious reasons, such symposia have also appeared in the reviews published by the armed forces. *E.g., Symposium on Military Justice,* 12 Mil. L. Rev. 1 (1961).

occasional student note.[2] The *American Bar Association Journal* regularly carries short articles on the Uniform Code of Military Justice.[3] Nonetheless, it has been said with some justice that "what little scholarly writing there is about military law appears in service-sponsored publications and criticism of the [United States Court of Military Appeals'] opinions lacks the open and robust nature that characterizes other specialty bars such as the tax bar or the personal injury bar."[4] Such scholarly comment as there is tends to fall into two main categories: the sweeping panorama, pointing out major trends such as the prolonged "civilianization" debate,[5] or, for variety, microscopic analyses of individual cases for the purpose of pointing up flaws thought to infect the system.[6]

Each approach has some merit; together they help ensure that we overlook neither forest nor trees. Sometimes, however, we may also be able to discern things of importance simply by shifting our focus to yet a third zone—those less obvious features of the system which seem to be so much a part of the landscape that at first the eye misses them. The practice of the Court of Military Appeals in granting review of issues not specified by any litigant is one such perspective previously addressed in these

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2. In addition, for a time, several civilian law reviews regularly carried articles on military law. For a short while, the *Miami Law Quarterly* had a section entitled *Synopsis of the Decisions of the Court of Military Appeals*. The *New York University Law Review* also carried a series of articles on military law as part of the *Annual Survey of American Law*. *See* Hartnett, *Survey Extended—The Literature of Military Law Since 1952*, 12 VAND. L. REV. 369, 381 & n.69, 393 & n.85 (1959); *see also* Gaynor, *Military Justice Source Material*, 55 L. LIBR. J. 16, 30 (1962). It is surprising that none of the three military law reviews currently publishes an annual survey of military law along the lines of the circuit reviews by academic law reviews for the United States Courts of Appeals. *See generally* Roehrenbeck, *A Checklist of Annual Surveys of State and Federal Laws*, 73 L. LIBR. J. 17, 18–21 (1980).
3. *E.g.*, Lasseter & Thwing; *Military Justice in Time of War*, 68 A.B.A.J. 566 (1982); Fidell, *Military Justice: The Bar's Concern*, 67 A.B.A.J. 1280 (1981); Cooper & Cooke, *Military Justice: Marching to a Different Drumbeat*, 64 A.B.A.J. 1362 (1978); Waltz, *The Court of Military Appeals: An Experiment in Judicial Revolution*, 45 A.B.A.J. 1185 (1959).
4. F. Gindhart, Designing and Implementing a Social Science Module for Management in the United States Court of Military Appeals 29 (1980) (unpublished thesis on file at the Institute for Court Management, Denver, Colo.). Such criticism as there is has not always been well-received. *See* Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 SO. ILL. U. L. Rev. 1, 29 n.126 (C.M.A. "reviewed one critical article as reflecting conduct unbecoming a member of its bar, but no disciplinary proceedings were instituted").
5. *Compare, e.g.*, Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970), *with, e.g.*, Gasch, *Who is Out of Step?*, ARMY LAW. June 1978, at 1, *and* Avins, *Hazardous Duty in Military Law: The Inapplicability of Civilian Sources*, 51 MARQ. L. REV. 51, 62 (1962).
6. *E.g.*, Avins, *New Light on the Legislative History of Desertion Through Fraudulent Enlistment: The Decline of the United States Court of Military Appeals*, 46 MINN. L. REV. 69, 72 (1961).

pages.[7] A second involves appellate procedural rules. Two others are the policies concerning publication of opinions, and the arrangements made to facilitate decisional and doctrinal interaction between the military appellate courts and the other organs of appellate criminal justice in this country. A consideration of these may prove a revealing exercise for both the civilian and military bars, not simply for the purpose of gauging the development of the military justice system, but to suggest an area in which its potential contribution has not yet been fully achieved.

In a foreword to the treatise on military law published in 1956 by the present Chief Judge of the Court of Military Appeals, Judge Brosman suggested that "it is overly optimistic, I am afraid, to expect that any substantial number of civilians—either lawyers or laymen—will undertake to thumb through the decisions of the Court of Military Appeals and the Boards of Review and the statutes from which they stem, for the purpose of attempting to discover what is transpiring in the sphere of military justice."[8] Much has transpired in the intervening years, but the civilian audience for military law remains quite limited,[9] and will probably always be that way—particularly in the absence of conscription. This article will explore whether changes could be made in the system of disseminating and digesting military appellate decisions to render this body of law more accessible and thereby advance the objective of making military law "an integral part of American jurisprudence,"[10] even if it springs from "a legal tradition that is radically different from that which is common in civil courts."[11]

## II. The Relationship Between Military and Civilian Law.

Civilian jurisprudence has occasion to refer to military law in three types of cases. The first category includes those cases where a military personnel action such as a court-martial, nonjudicial punishment or administrative

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7. Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99 (1980).
8. Brosman, Foreword to R. Everett, Military Justice in the Armed Forces of the United States iii (1956). *See also* Waltz, *supra* note 3.
9. According to the periodic statements of circulation, the average paid circulation of West's *Military Justice Reporter* was 3508 copies for the year ending September 30, 1977, 3 M.J. Adv. Sh. No. 12, L, 2956 for the next year, 5 M.J. Adv. Sh. No. 12, XLII, 2934 for the next two years, 7 M.J. Adv. Sh. No. 12, XXXVIII, 9 M.J. Adv. Sh. No. 13, LXIV, and 2940 for the year ending October 1, 1981. 11 M.J. Adv. Sh. No. 13, XXVIII. Military procurement accounts for much of this circulation.
10. Quinn, *United States Court of Military Appeals and Military Due Process*, 35 St. John's L. Rev. 225, 254 (1961), *quoted in* Cook, *supra* note 4, at 30.
11. Noyd v. Bond, 395 U.S. 683, 694 (1969).

discharge is the subject of collateral attack.[12] The second includes those occasional cases in which the subject matter of civilian litigation—civil[13] or criminal[14]—is such that it directly or indirectly requires or suggests the consideration of issues of military law. The third includes all those infinite other cases in which military jurisprudence might—like the jurisprudence of any common law jurisdiction—be referred to for whatever persuasive value or precedential merit it might possess.[15] This latter category is potentially the broadest of the three, but to date is in reality the one where civilian reference to military jurisprudence has fallen most short of the possible level of interaction.

Despite the opportunities thus presented, in the more than three decades since the Court of Military Appeals decided its first case, it has had little influence on the development of American law, either federal or state.

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12. *E.g.*, O'Callahan v. Parker, 395 U.S. 258 (1969) (court-martial jurisdiction); Dumas v. United States, 620 F.2d 247 (Ct. Cl. 1980) (nonjudicial punishment; gate search); Donnelly v. United States, 525 F. Supp. 1230 (E.D.Va. 1981) (nonjudicial punishment; canine search of leased quarters); Giles v. Secretary of the Army, 475 F. Supp. 595 (D.D.C. 1979), *aff'd as modified*, 627 F.2d 554 (D.C. Cir. 1980) (discharge upgrade; urinalysis).
13. *E.g.*, Platis v. United States, 288 F. Supp. 254, 264 (D. Utah 1968), *aff'd*, 409 F.2d 1009 (10th Cir. 1969) (FTCA; automobile accident); *In re* Brown, 402 So.2d 354, 355 & n.1 (Miss. 1981) (impact of military conviction for negligent homicide of husband on guardianship of child); *cf.* Rapp v. Gibson, 51 Cal.2d 467, 470 (1959) (en banc) (termination date of war).
14. *E.g.*, United States v. Newell, 578 F.2d 827, 830 (9th Cir. 1978) (inapplicability of military suppression rules to civilian federal prosecution); United States v. Head, 416 F. Supp. 840, 844 & n.10 (S.D.N.Y.), *aff'd*, 546 F.2d 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 931 (1977) (civilian drug prosecution of Air Force member); United States v. Shafer, 384 F. Supp. 486 (N.D. Ohio 1974) (prosecution of Kent State national guardsmen); Gov't of the Canal Zone v. Furukawa, 361 F. Supp. 194 (D.C.Z. 1973) (civilian drug prosecution based on sham military "inventory"); Martin v. Commonwealth, 592 S.W.2d 134 (Ky. 1979) (confession tainted by illegal civilian arrest for unauthorized absence); State v. Nelson, 298 N.C. 582, 260 S.E.2d 637 (1979), *cert. denied*, 446 U.S. 929 (1980) (military search; civilian prosecution); State v. Sanders, 295 N.C. 361, 245 S.E.2d 674, 685 (1978) (civilian prosecution for murder of military policeman).
15. *E.g.*, Miranda v. Arizona, 384 U.S. 436, 489 & n.63 (1966) (custodial interrogations); United States v. Morrow, 537 F.2d 120, 140 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977) (search by foreign authorities); United States v. Griffin, 413 F. Supp. 178, 184 (E.D. Mich. 1976) (canine search); United States v. Tiede, 86 F.R.D. 227, 244 n.69 (Berlin 1979) (noting analogy between U.S. Court for Berlin and courts-martial); People v. St. Andrews, 101 Cal. App.3d 450, 466 n.5, 161 Cal. Rptr. 645 (1st Dist. 1980) (reasonableness of rape defendant's belief that victim had consented); State v. Wells, 290 N.C. 485, 501, 226 S.E.2d 325, 335 (1976) (intent element of assault with intent to commit rape); Kinard v. State, 335 So.2d 916, 924 (Ala. Crim. App. 1975) (Bookout, J., dissenting) (plain view searches); State v. Crenshaw, 27 Wash. App. 326, 336 n.2, 617 P.2d 1041, 1047 n.2 (1980) (insanity test; collecting cases); State v. Williams, 285

The Boards of Review and Courts of Military Review have had even less influence, even though they have decided many more cases than the Court of Military Appeals. Text writers refer to military cases only infrequently.[16] Aside from materials such as the Public Law Education Institute's *Military Law Reporter* or the Bureau of National Affairs' *United States Law Week* and *Criminal Law Reporter*, cases arising under the Code do not commonly appear in the specialized "services" available to civilian lawyers.[17] Civilian courts (both federal and state) have taken note of the work of the courts established under the Code more often than is commonly thought,[18] but the level of interaction seems low considering the "law explosion" that occurred in this 30-year period.[19] Except where the civilian case itself directly involved issues of military law (as in the first two categories identified above), the civilian courts have not afforded particular deference to those few military decisions that may have been brought to their attention.

Some of this is understandable. On constitutional matters, there may be a reluctance to defer to judgments of the Court of Military Appeals because that court possesses no special expertise in the area,[20] even though the subjects considered by it "involve the same type of constitutional issues

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N.W.2d 248, 257 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980) (hypothetical independent source rule for searches and seizures); *see also* cases cited in notes 32 (impossibility defense) and 35 *infra* (voiceprint evidence).

16. Some of the few treatises to cite military cases are W. LaFave & A. Scott, Handbook of Criminal Law 438–39, 443 (1972); S. Kadish & M. Paulsen, Criminal Law and Its Processes 365 (3d ed. 1975); N. Leech, C. Oliver & J. Sweeney, Cases and Materials on the International Legal System 676 (1973) (reproducing Army Board of Review case); E. Cleary, McCormick's Handbook of the Law of Evidence 490 n.31 (2d ed. 1972).
17. Such cases as are reported in the civilian "services" appear on a thoroughly unpredictable basis. On occasion, Court of Military Appeals cases have materialized in Callaghan & Co.'s *Federal Rules of Evidence Reporter*. *See, e.g.*, United States v. Weaver, 23 C.M.A. 445, 50 C.M.R. 464, 1 Fed. Evid. Rep. 1078 (1975); United States v. Pjecha, 7 M.J. 455, 5 Fed. Evid. Rep. 773 (C.M.A. 1979). They also figure occasionally—indeed, sometimes prominently—in annotations. *E.g.*, Annot., 24 A.L.R. Fed. 189, 191 n.1 *et seq.* (1975) (extensive discussion of military cases); Annot., 97 A.L.R.3d 294, 317 (1980) (citing military voiceprint case).
18. *See, e.g.*, W. Generous, Swords and Scales: The Development of the Uniform Code of Military Justice 177 (1973) (decision in United States v. Smith a landmark on insanity issues; "one of the few Court of Military Appeals opinions ever cited by civilian federal courts").
19. A review of the May 1982 Shepard's *Military Justice Citations* indicates 16 citations to military cases in the Supreme Court, 87 in the United States courts of appeals, 25 in the district courts, and 17 in the courts of 12 states. These figures do not reflect the period prior to the advent of the citator, but computer research suggests that civilian reference to military cases was, if anything, even sparser in prior years.
20. *E.g.*, Schlesinger v. Councilman, 420 U.S. 738, 765 n.3 (1975) (Brennan, J., concurring in part and dissenting in part).

routinely handled by the federal civilian courts."[21] Its decisions, however, are not subject to direct review by the Supreme Court.[22] In the lower federal courts, it has been held that decisions of the Court of Military Appeals are persuasive, but not binding authority,[23] one court suggesting that a decision of the Court in the field of military law is presumptively correct.[24] The respect accorded to the Court is greatest, of course, in the field of military law, such as interpretation of the Code or the *Manual for Courts-Martial*.[25] One decision has referred to the Court of Military Appeals' "analysis of certain military procedures [as] immensely helpful in effectuating the controlling precedents."[26] To a considerable degree, the deference afforded to military case law to date has been founded not on a sense of the points of convergence with the civilian system, but rather on the differences.[27]

Typical of the civilian cases that refer to military jurisprudence are those involving the insanity defense, where the appellate court may feel called upon to survey the rules in various jurisdictions, and treats the military as

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21. *See* Dep't of Defense, Off. of General Counsel, Reform of the Court of Military Appeals B-84 (1979).
22. Various proposals have been made over the years to extend the certiorari jurisdiction to cases decided in the Court of Military Appeals, and one was passed by the House of Representatives in 1980. H.R. 8188, 96th Cong., 2d Sess. (1980), *passed by H.R.*, 126 CONG. REC. H10340-42 (daily ed. Oct. 2, 1980). If such a measure were enacted, it could serve to encourage the integration of military law into the larger system of American law, although it would be surprising if many military petitions for certiorari were granted. In the United Kingdom, decisions of the Courts-Martial Appeal Court may be appealed to the House of Lords by either side, but only if "certified by the Appeal Court that a point of law of general public importance is involved in the decision and it appears to the Court or the House of Lords, as the case may be, that the point is one which ought to be considered by that House." Courts-Martial (Appeals) Act 1968, ch. 20, § 39. *See also* National Defence Act, CAN. REV. STAT. ch. N-4, § 208 (1970) (appeals to Supreme Court of Canada); Courts-Martial Appeals Act 1955, § 51 (Austl.) (referral of questions of law from Courts-Martial Appeal Tribunal to High Court of Australia).
23. United States v. Shafer, 384 F. Supp. 486, 488 (N.D. Ohio 1974); Betonie v. Sizemore, 369 F. Supp. 340, 350 (M.D. Fla. 1973), *aff'd in part, rev'd in part & remanded*, 496 F.2d 1001 (5th Cir. 1974); Jackson v. McElroy, 163 F. Supp. 257, 266 (D.D.C. 1958); *see also* Doe v. Renfrow, 475 F. Supp. 1012, 1018 n.9 (N.D. Ind. 1979) ("military cases are not dispositive of or binding precedent on the issues raised here").
24. Jackson v. McElroy, 163 F. Supp. 257, 266 (D.D.C. 1958).
25. *See, e.g.*, Middendorf v. Henry, 425 U.S. 25, 43 (1976) ("normally entitled to great deference" when "[d]ealing with areas of law peculiar to the military"); People v. Disbrow, 16 Cal.3d 101, 128 (1976) (Richardson, J., dissenting).
26. United States v. Shafer, 384 F. Supp. 486, 488 (N.D. Ohio 1974).
27. *E.g.*, Noyd v. Bond, 395 U.S. 683, 694 (1969); *cf.* Schlesinger v. Councilman, 420 U.S. 738, 753 (1975) (noting "deference that should be accorded the judgments of the carefully designed military justice system established by Congress").

one of these.[28] Other issues that have furnished opportunities for civilian courts to rely on, reject or otherwise deal with military case law include plain view searches,[29] possession questions in narcotics cases,[30] use of canine searches,[31] the impossibility issue in *Thomas & McClellan*,[32] right to counsel and confession problems,[33] treatment of military pensions,[34] and the admissibility of voiceprints.[35] Military search and seizure decisions "have been looked into by the local judges in deciding whether or not the products of searches conducted on military posts could be introduced in the local state court trial."[36] In some instances, the military system has been treated as just another part of the federal court structure,[37] while in others, the courts have emphasized the special circumstances of the military and the peculiarities of the Code as reasons for not following a military

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28. *E.g.*, Gov't of the Virgin Islands v. Fredericks, 578 F.2d 927, 940 n.23 (3d Cir. 1978); Wade v. United States, 426 F.2d 64, 82 (9th Cir. 1970) (Trask, J., dissenting); United States v. Naples, 192 F. Supp. 23, 38 (D.D.C. 1961), *rev'd*, 307 F.2d 618 (D.C. Cir. 1962); State v. Harkness, 160 N.W.2d 324 (Iowa 1968); State v. Smith, 223 Kan. 203, 574 P.2d 548 (1977) (Prager, J., dissenting).
29. *E.g.*, Shipman v. State, 291 Ala. 484, 487, 282 So.2d 700, 703–04 (1973); Kinard v. State, 335 So.2d 916 (Ala. Crim. App. 1975); Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (1974).
30. *E.g.*, Brown v. State, 481 P.2d 475, 478 (Okla. Crim. App. 1971).
31. *E.g.*, Doe v. Renfrow, 475 F. Supp. 1012, 1018 n.9 (N.D. Ind. 1979).
32. United States v. Thomas, 13 C.M.A. 278, 32 C.M.R. 278 (1963). *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 185 (3d Cir. 1973); State v. McElroy, 128 Ariz. 315, 316–17, 625 P.2d 904, 905–06 (1981) (en banc); State v. Moretti, 52 N.J. 182 (1968); People v. Dlugash, 41 N.Y.2d 725 (1977); People v. Rollino, 37 Misc. 2d 14, 18 (Sup. Ct. 1962).
33. *E.g.*, People v. Disbrow, 16 Cal.3d 101, 114 1976); People v. Kelley, 66 Cal.2d 232, 247–49 (1967); People v. Dorado, 62 Cal.2d 338 (1965); *In re* Palacio, 238 Cal.App.2d 545, 548 (2d Dist. 1965); Owens v. United States, 340 A.2d 821, 824 (D.C. App. 1975); Commonwealth v. Beaulieu, 333 Mass. 640, 654 (1956).
34. *E.g.*, *In re* Fithian, 10 Cal.3d 592, 603 n.16 (1974) (en banc).
35. *E.g.*, Hodo v. Superior Court, 30 Cal.App.3d 778, 779 (4th Dist. 1973); Brown v. United States, 384 A.2d 647, 649 (D.C. App. 1978); Alea v. State, 265 So.2d 96, 98 (Fla. App. 1972); Worley v. State, 263 So.2d 613, 614 (Fla. App. 1972); Reed v. State, 283 Md. 374, 388–89 nn.10–11, 391 A.2d 364, 372 (1978); State v. Williams, 388 A.2d 500, 505 n.5 (Me. 1978); Commonwealth v. Lykus, 367 Mass. 191, 207 n.1, 327 N.E.2d 671, 680 n.1 (1975) (separate opinion of Kaplan, J.); State *ex rel.* Trimble v. Hedman, 291 Minn. 442, 452, 192 N.W.2d 432 (1971) (en banc); State v. Cary, 99 N.J. Super. 323, 333 (1968); People v. Rogers, 86 Misc. 2d 868, 875 (Sup. Ct. 1976); State v. Olderman, 44 Ohio App. 2d 130, 336 N.E.2d 442, 448 (1975). The decision in United States v. Wright, 17 C.M.A. 183, 37 C.M.R. 447 (1967), was the first appellate case to deal with voiceprints. Decker & Handler, *Voiceprint Identification Evidence–Out of the* Frye *Pan and Into Admissibility*, 26 AM. U. L. REV. 314, 334 (1977).
36. *A Look at Chief Judge Robinson O. Everett*, 5 DIST. LAW., No. 6, at 31, 34 (July–Aug. 1981); *e.g.*, State v. Nelson, 298 N.C. 582, 260 S.E.2d 637 (1979), *cert. denied*, 446 U.S. 929 (1980).
37. *E.g.*, State v. Harkness, 160 N.W.2d 324 (Iowa 1968); State v. Smith, 223 Kan. 203, 574 P.2d 548 (1977).

rule.[38] The Court of Military Appeals itself has emphasized its uniqueness based on "the necessity for the Court to often weigh the needs of the uniformed services in considering matters of justice," even as it "recognizes that other courts may look to it for guidance in all matters relating to criminal law."[39] As should be clear, a number of the areas in which civilian courts have looked to military law are not "areas peculiar to the military branches."[40]

Some of the references in civilian cases have clearly been approving ones, referring to the Court of Military Appeals' "exhaustive, able, and convincing opinion,"[41] "exhaustive and extremely well-considered opinion,"[42] correct assessment,[43] persuasive rationale,[44] careful analysis[45] or "revealing" treatment[46] of a problem, or to an able Court of Military Appeals identification of a pertinent distinction among the cases.[47] In a case involving a state National Guard summary court-martial, an intermediate court in California referred to a decision of the Court of Military Appeals as "respectable authority,"[48] while the District of Columbia Court of Appeals found it significant that the Court of Military Appeals had ruled a particular way in a case involving Article 31 warnings.[49] A Florida intermediate court has treated *United States v. Wright*[50] as "additional persuasive authority" in the voiceprint area,[51] and the Supreme Court of Minnesota has referred to that case's "exhaustive discussion of the de-

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38. *E.g.*, United States v. Berrigan, 482 F.2d 171, 185 (3d Cir. 1973); Betonie v. Sizemore, 369 F. Supp. 340, 350 (M.D. Fla. 1973), *aff'd in part & remanded*, 496 F.2d 1001 (5th Cir. 1974); Hooper v. Goldstein, 104 R.I. 32, 47, 241 A.2d 809, 817 (1968) (but finding reasoning apposite).
39. 1974 ANN. REP. OF C.M.A. AND THE JUDGE ADVOCATES GENERAL 6.
40. Middendorf v. Henry, 425 U.S. 25, 42 (1976); *see also* Reform of the Court of Military Appeals, *supra* note 21, at C-46 (noting difficulty of determining scope of "areas peculiar to the military branches").
41. Gordon v. Willingham, 188 F. Supp. 2, 4 (M.D. Pa. 1960), *aff'd*, 294 F.2d 575 (3d Cir. 1961).
42. People v. Rollino, 37 Misc.2d 14, 18 (Sup. Ct. 1962).
43. Wade v. United States, 426 F.2d 64, 82 (9th Cir. 1970) (Trask, J., dissenting).
44. Priest v. Secretary of the Navy, 570 F.2d 1013, 1018 (D.C. Cir. 1977).
45. Doe v. Renfrow, 475 F. Supp. 1012, 1026 (N.D. Ind. 1979).
46. *Id.* at 1018 n.9.
47. State v. Fisher, 242 Ore. 419, 424, 410 P.2d 216, 218 (1966) (Goodwin, J., dissenting).
48. *In re* Palacio, 238 Cal. App. 2d 545, 548 (2d Dist. 1965).
49. Owens v. United States, 340 A.2d 821, 824 (D.C.App. 1975).
50. 17 C.M.A. 183, 37 C.M.R. 447 (1967).
51. Alea v. State, 265 So.2d 96, 98 (Fla. App. 1972).

velopment and use of voice identification by spectrograph."[52]

Notwithstanding these cases and the potentially pervasive interplay between civilian and military caselaw, it remains true that "[d]ecisions of the Military Courts are not usually used as precedent for courts of law. . . ."[53] Recognizing as we must that a good part of the output of the military appellate courts is transferable only with difficulty to the civilian setting,[54] should we be surprised by this, or, more importantly, is the infrequency of civilian reference to military case law in those equally, if not more, numerous areas where such reference might be productive, a phenomenon to be regretted and, if possible, remedied? The answer to the latter question should quite clearly be "yes." The Court of Military Appeals has been said to possess unusual freedom to select the best rule of decision, and "to find its law where it will, to seek, newfledged and sole, for *principle*, unhampered by the limiting crop of the years."[55] This freedom implies a vigorous interaction with the other sources of common law decision in this country. To be effective, the interaction should be a dialogue rather than simply military mimicry of rules elaborated elsewhere. It should be a two-way street, in which the military appellate courts

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52. State *ex rel.* Trimble v. Hedman, 291 Minn. 442, 192 N.W.2d 432 (1971) (en banc); *see also* Gallagher v. Quinn, 363 F.2d 301, 304 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966) (noting C.M.A.'s "exhaustive" treatment of constitutionality of UCMJ Art. 67(b) ). Military case law has also contributed modestly—at best—to the development of civilian jurisprudence in the United Kingdom. In one case, the Criminal Division of the Court of Appeal commented that a particular principle was nowhere better stated than in Regina v. Murphy, [1965] N.Ir. 138, a decision of the Northern Ireland Courts-Martial Appeal Court. Regina v. McEvilly, 60 Crim. App. 150 (1973). In Regina v. Sang, 1980 A.C. 402, [1979]2 All E.R. 46, 57, [1979]2 W.L.R. 439, 451, 68 Crim. App. 240 (1978), the Court of Appeal referred to the same court-martial appeal decision as "of the highest persuasive authority." Sad to report, the military case in question was based on dicta concerning the entrapment defense which were subsequently disavowed. The House of Lords eventually reversed *Sang*, expressly disapproving *Murphy*. 1980 A.C. 402, [1979]2 All E.R. 1222, 1227, [1979]3 W.L.R. 263, 268 (H.L. 1979) (Lord Diplock).

53. State v. Elkins, 245 Ore. 279, 286, 422 P.2d 250, 253 (1966). The Oregon court's dichotomy between "Military Courts" and "courts of law" speaks volumes, unfortunately, and illustrates in a few words the depth of the problem.

54. *See, e.g.*, cases cited *supra* note 38; *see also* Noyd v. Bond, 395 U.S. 683, 696 (1969) (declining to interpret "extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself").

55. Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166, 167–78 (1953); Walker & Niebank, *The Court of Military Appeals—Its History, Organization and Operation*, 6 VAND. L. REV. 228, 238 (1953). The statement of principle seems to be intact, although there may be dispute as to whether any particular case offers an opportunity for interstitial lawmaking. *See* Soriano v. Hosken, 9 M.J. 221, 239 (C.M.A. 1980) (Cook, J., dissenting).

It could be argued that the restless freedom emphasized by Judge Brosman became a judicial Frankenstein's monster, since it may have unwittingly tended to discourage

contribute to the growth of the law, just as they are nourished by developments and insights generated elsewhere. In a sense, this feedback from the military to the civilian system should be seen as a corollary of "civilianization."

Recent confirmation of this seems to appear in Rule 102 of the Military Rules of Evidence, which provides that

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.[56]

This is fully consonant with the duty of the Article III courts to contribute to the growth of the law,[57] as well as with the understanding of the role of the Court of Military Appeals articulated in Judge Brosman's seminal article in the *Vanderbilt Law Review*. Particularly considering the overwhelming areas of similarity between the Federal Rules of Evidence and the Military Rules of Evidence, it would be a loss to federal jurisprudence if the military courts were always cast in the role of mere consumers of law developed elsewhere, and never as contributors to that larger body of the

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doctrinal stability and thereby sap the court's pronouncements of the legitimacy that comes of predictability. Personnel turnover has much the same effect, *see, e.g.*, note 116 and accompanying text *infra*, but magnifies the adverse consequences of the Brosman doctrine. If the course he advocated was necessary to mark the break with the pre-Code system of military justice, it should be recognized that the freedom thus purchased came at a far higher institutional price than may have been anticipated. Such factors as the Court's formal isolation from the civilian judicial system and practical isolation from the civilian bar, the lack of sustained academic criticism, the transferability of the chief judgeship, the political balance requirement for appointment, UCMJ Art. 67(a), 10 U.S.C. § 867(a) (1976 & Supp. IV 1980), and residual hostility to the very notion of civilian review of courts-martial cumulatively serve to deprive the court of many of the sources of institutional strength that furnish the mortar for a sound appellate structure. But that is another article.

56. MIL. R. EVID. 102. Rule 102 replicates FED. R. EVID. 102. The Drafters' Analysis for the Military Rules points out that Rule 102 is "without counterpart in the present Manual for Courts-Martial." MCM, 1969 (Rev.), at A18–3.

57. *See generally* 1 MOORE'S FEDERAL PRACTICE ¶ 102.02, at 1–8 to –10 (2d ed. 1982); 21 C. WRIGHT & K. GRAHAM., FEDERAL PRACTICE AND PROCEDURE § 5025, at 150 (1977) ("[i]t may also be helpful to look at other systems of adjudication for ideas for new ways to deal with evidence"; no reference to military law).

law of evidence. The same is true of other areas of law as well.[58]

It is also significant that the drafters of the Military Rules of Evidence declined in a number of instances to select a rule of law in cases where the federal rule was unclear or where there was no prevailing view.[59] The result of this is to call upon the military courts to determine what rule would be generally applied in the trial of criminal cases in the district courts, thus directly involving themselves in the process of doctrinal development. This being so, it would be regrettable if military jurisprudence were to continue to grow in a hothouse environment—influenced, to be sure, by outside stimuli, but scarcely influencing the outside.

## III. Access to Law: Publication Policies.

Since 1975, decisions of the Court of Military Appeals and the four Courts of Military Review have been published by the West Publishing Co. Prior to that time, they were published by the Lawyers Co-operative Publishing Co.[60] Although the shift to West was accompanied by consider-

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58. To the extent that states increasingly model their rules of evidence on the Federal Rules, the opportunities for contribution to the development of state evidence doctrines are also enhanced. In the military law field, a number of states have departed from the Uniform [State] Code of Military Justice § 701, 11 U.L.A. 335, 376 (1961), and apply the rules of evidence used in federal courts-martial when conducting the occasional state National Guard court-martial. *See* 1 Wigmore, Evidence § 4d, at 26–27 (W. Reiser Supp. 1981) (collecting state statutes). An exception must therefore be recognized to the general proposition that "such proceedings would be completely apart from the Uniform Code of Military Justice and would have no federal aspects." United States v. Self, 13 M.J. 132, 137 n.9 (C.M.A. 1982).

59. *E.g.*, Mil. R. Evid. Drafters' Analyses of Rule 313(c) (no opinion expressed regarding lawful scope of inventories), Rule 314(e)(4), (f) (noting unresolved issues), Rule 321(b)(2) (noting need for recourse to case law), Rule 607 (noting intent that rule be interpreted in a particular fashion unless the Article III courts interpret the counterpart differently), Rule 608(b)–(c) (noting "[d]eveloping Article III practice"), Rule 702 (degree of acceptance of certain types of expert testimony in Article III courts as a factor to consider), Rule 801(d)(2)(E) (noting split among circuits, urging continuation of current military doctrine until Article III practice is settled), Rule 803(24) (noting unsettled state of the civilian cases, urging use of rule "in the same manner as it is generally applied in the Article III courts"), Rule 804(b)(3) (rule to be applied consonant with practice of Article III courts).

60. There was a brief interregnum during which multilithed materials were produced. West began publication of the slip opinions and Daily Journal of the Court of Military Appeals in March 1977. 1977 Ann. Rep. of C.M.A. and the Judge Advocates General 4. The first issuances of the *Military Justice Reporter* were the advance sheets for 3 M.J. The missing period from the end of the C.M.R. series was covered in 1–2 M.J., which appeared only as bound volumes.

able discussion and review of the options,[61] further attention to the publication policies is in order. A similar reassessment has been taking place in the Article III courts.[62]

The early history of the publication policy is ably summarized by William T. Generous, Jr., from whom we learn that one of the options explored at the beginning of operations under the Code was publication of selected opinions of the Court of Military Appeals in the *Federal Reporter*.[63] This was rejected by the Court because it "would not satisfy the need to communicate all decisional law to the Armed Forces. . . ."[64] The Court also insisted that its own decisions be reported in full separately, in addition to inclusion in the *Court-Martial Reports* (C.M.R.).[65] The result was the system of dual reports in effect through 1975.

Under that system, the *United States Court of Military Appeals Reports* (C.M.A.) included all of the Court's full opinions as well as such miscellaneous actions as denials of petitions for grant of review. The *Court-Martial Reports* included all Court of Military Appeals decisions, although they did not report orders denying review of Board of Review or Court of Military Review decisions that were themselves unreported.[66] Decisions of the latter were published at the discretion of the individual armed services. Some of the unpublished cases were published unofficially in the *Military Law Reporter*.

With the advent of West's *Military Justice Reporter*, publication of actions of the Court of Military Appeals became all-inclusive. The Daily Journal, previously available only in mimeograph form or in the Court's

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61. Much of this discussion took place within the Code Committee established under Article 67(g), 10 U.S.C. § 867(g) (1976). *See, e.g.*, 1977 ANN. REP. OF C.M.A. AND THE JUDGE ADVOCATES GENERAL 1, 1976 *id.* 2. The Code Committee had a "West publication committee" to handle the administrative aspects of the transition. *See* Minutes of July 12, 1977 Code Committee Meeting. Initially, contact with West was handled by the Code Committee's Executive Secretary (Court Executive of the Court of Military Appeals). Minutes of April 12, 1977 Code Committee Meeting. At present, the Air Force is responsible for administration of the contractual relationship with West. The Code Committee was also instrumental in the creation of a military justice citator by Shepard's/McGraw-Hill. 1977 ANN. REP. OF C.M.A. AND THE JUDGE ADVOCATES GENERAL 1.

62. Civilian analyses of publication policies have tended to overlook the military courts. One early student note indicated that the Court of Military Appeals had been included in a survey of federal appellate court publication policies, but neglected to elaborate on the court's response. Note, *Selective Publication of Case Law*, 39 SO. CAL. L. REV. 608, 611 n. 12 (1966).

63. W. GENEROUS, *supra* note 18, at 75.

64. *Id.*

65. *Id.* at 76.

66. 1 C.M.R. xi (1952).

Minute Books,[67] is now published in full, including such entries as petitions and certificates for review, mandatory review cases and motions filed, petitions and motions granted, summary dispositions, mandates issued, interlocutory orders—and even marriages performed.[68] All opinions are published, including memorandum actions and dissents from denials of grants of review or denials of petitions for extraordinary relief.

The matter is otherwise at the Courts of Military Review. Technically, the power to select cases for publication rests with each Judge Advocate General,[69] and this has led to some concern that the publication power could be used to influence the Courts of Military Review.[70] At present, the Army Court and the Navy-Marine Corps Court apply the American Bar Association standard for publication of opinions, as set forth in the margin.[71] The Air Force Court generally publishes signed opinions and generally does not publish short per curiams unless the case involves an unusual

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67. Fidell, *supra* note 7, at 100 n.12.
68. *In re* Cramer & Armao, 9 M.J. 266 (C.M.A. 1980) (Cook, J., officiating). Disciplinary orders have not been published. The court's only known disbarment, *In re* DeFina, No. 13,600A (C.M.A. Feb. 17, 1960), a case which engendered prolonged controversy, *see* DeFina v. Latimer, 79 F.R.D. 5 (E.D.N.Y. 1977), was never reported.
69. D. ADDLESTONE, J. KOSLOSKE, L. MILFORD, K. SNYDER, B. STICHMAN & NAT'L VETERANS LAW CENTER, MILITARY DISCHARGE UPGRADING AND INTRODUCTION TO VETERANS ADMINISTRATION LAW § 4.6.2, at 4/13 n.97 (1982).
70. H. MOYER, JUSTICE AND THE MILITARY 753 (1972). The Courts of Military Review currently enjoy substantial autonomy in this regard. The Judge Advocate General of the Navy has delegated his power to select opinions for publication to the Chief Judge of the Navy-Marine Corps Court. Internal Procedures Manual § 401 (N.C.M.R. 1977).
71. ABA Standards Relating to Appellate Courts § 3.37(b) (1977):

> (b) Formal publication. An opinion of an appellate court should be published in the series of printed volumes in which the opinions of the court appear only if, in the judgment of the judges participating in the decision, it is one that:
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> (1) Establishes a new rule of law, alters or modifies an existing rule, or applies an established rule to a novel fact situation;
>
> (2) Involves a legal issue of continuing public interest;
>
> (3) Criticizes existing law; or
>
> (4) Resolves an apparent conflict of authority.
>
> A concurring or dissenting opinion should be published if its author believes it should be; if such an opinion is published the majority opinion should be published as well.

Paragraph 9-5 of the Internal Operating Procedures of the Army Court contemplates publication of opinions which question as well as criticize existing law, or which constitute "a significant contribution to military law because of its historical or interpretive review of prior jurisprudence." *Cf.* United States v. Pooler, 13 M.J. 786, 789 (A.C.M.R. 1982) (on motion for reconsideration) (full opinion unnecessary for fact-bound cases decided by intermediate appellate court required to satisfy itself as to findings and appropriateness of sentence). Section 402 of the Internal Procedures Manual of the Navy-Marine Corps Court tracks the ABA Standard.

legal or factual situation.[72] The Coast Guard also has no formal guidance on this subject; it publishes all of its few opinions. Miscellaneous orders are typically not published by any of the Courts of Military Review. Trial court issuances are not published unless they are appended to the appellate decision in a reported case.[73]

Whether this state of affairs should continue depends on how one understands the purposes served by a reporting system for the military. First and foremost, certainly, is the need to advise the consumers of the system of the pronouncements of the higher courts. This should be done at reasonable cost, but the result should also not be overinclusive, since future military requirements may involve field settings[74] where there may be a premium on portability of research materials. Assuming there is no general shift to fiche systems for retrieval of military cases, this means that the inessential should be excluded from military reports. Among the chief candidates for exclusion would be much of the material found in the Daily Journal of the Court of Military Appeals. It has been held that denials of petitions for grant of review have no value as precedent,[75] and thus one can argue that these should be excluded from the published reports. Many cases could well be left out of full-text publication, being relegated to the tables used for certain summary dispositions in the Article III courts of appeals.

This is not the place to repeat the debate being waged in the civilian community over the selective publication of appellate decisions.[76] Every reader with access to the *Military Justice Reporter* will certainly be able to identify at least some Court of Military Appeals cases that do not merit publication. A few remarks, however, may be offered from the standpoint of the special situation of the Court within the military justice system. The

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72. *See* Standard Operating Procedures § 4a(2) (A.F.C.M.R. 1977) ("long form *per curiam* decision may be used where, although issues are discussed, no extended explanation is intended or no new points of law developed. Ordinarily such decisions are not intended for publication"). Air Force Court author judges are encouraged to give reasons when recommending publication of an opinion. *Id.* § 4b(g). The Air Force Court does not ordinarily cite unreported Board of Review or Court of Military Review cases as authority. *Id.* at 20.
73. *E.g.*, Cooke v. Orser, 12 M.J. 335, 346 (C.M.A. 1982) (reproducing trial judge's memorandum).
74. *See generally* Lasseter & Thwing, *supra* note 3.
75. United States v. Mahan, 1 M.J. 303, 307 n.9 (1976).
76. *See, e.g.*, Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) (hereinafter cited as *Price of Reform*); Reynolds & Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 807; Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978).

first is that the Court is often analogized to the Supreme Court,[77] which does publish all of its opinions and virtually all of its orders. The Court of Military Appeals itself, however, has not rigidly applied the analogy.[78] It was probably important in the early days of the Code for the Court to emphasize the resemblance, just as it was important to have a "vanity" reporter of its own, as a matter of heralding the Court's presence on the judicial scene. The need for this is far less apparent today. An all-inclusive publication policy cannot be justified simply because the Supreme Court has one. Miscellaneous actions—important though they be to the litigants—have little claim to the immortality they acquire when we permit them to clutter up the reports of decisions. The same is true of dispositions such as petition denials, summary dispositions or per curiams lacking any significant contribution to the development of military law.

One argument that might be advanced in opposition to a limited publication rule for the Court of Military Appeals is based on the role of the Court's central legal staff.[79] According to two leading authors on the subject, the danger that judicial responsibility will be delegated to a presiding judge or the staff "increases with the concentration of staff law clerks in areas of the law where the high volume of cases makes specialization possible—even desirable, given the possibility of economies of scale."[80] Among those

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77. *E.g.*, McPhail v. United States, 1 M.J. 457, 462 (C.M.A. 1976); United States v. Armbruster, 11 C.M.A. 596, 598, 29 C.M.R. 412, 414 (1960); Latimer, *Military Justice*, 45 L. LIBR. J. 148, 158 (1952); Feld, *Development of the Review and Survey Powers of the United States Court of Military Appeals*, 12 MIL. L. REV. 177, 182 (1961); B. FELD, A MANUAL OF COURTS-MARTIAL PRACTICE AND APPEAL 132, 142 (1957) (C.M.A. functions distinguished from those of Supreme Court; one-judge grants of review analogized to Supreme Court's "rule of four").
78. *See, e.g.*, United States v. Kuskie, 11 M.J. 253, 254-55 (C.M.A. 1981).
79. The functions of the staff are described in F. Gindhart, *supra* note 4, at 76–77; Reform of the Court of Military Appeals, *supra* note 21, at A-14; G. Harper, Central Legal Staff (paper presented at the Sixth Annual Homer Ferguson Conference on Appellate Advocacy (1981)). The Court's staff was evidently the model for other central staffs in the federal system. *See* D. MEADOR, APPELLATE COURTS, STAFF AND PROCESS IN THE CRISIS OF VOLUME 218 (1974), *noted in* Ubell, *Report on Central Staff Attorneys' Offices in the United States Courts of Appeals*, 87 F.R.D. 253, 256 n.12 (1980).
80. PRICE OF REFORM, *supra* note 76, at 625. One study of the Court of Military Appeals reported the contention by critics of the court "that the staff process involves unnecessary layering, produces entrenched views in [sic] the merits of legal issues, and reflects decisions made thirty years ago that no longer accord with the needs of the court or the military justice system." Reform of the Court of Military Appeals, *supra* note 21, at 28. It is difficult to reconcile this criticism with the more commonly voiced concerns over the instability of military law.

areas are criminal and prisoner cases,[81] which form the stock in trade of the Court of Military Appeals. Nonpublication of a decision thus increases the danger of an opinion that has actively engaged the attention of only one judge—or none at all.[82] This concern, however, is directly related to the use of central staff at the merits stage, rather than at the threshold, or certiorari, stage (for courts whose appellate jurisdiction is discretionary). For such a court, the influence of a central staff on the disposition of cases granted plenary review is likely to be much less than at the grant stage, and hence, a limited publication rule is less likely to mask a delegation than in a court whose jurisdiction was nondiscretionary.

On the other hand, it must be emphasized that a court whose jurisdiction is as discretionary as that of the Court of Military Appeals may with some justification take the position that any case deemed worthy of review is worthy of a published opinion.[83] The only way such a position may be tested is by canvassing the opinions in a range of cases granted review. Such a review will not be presented here, but the reader will note that many of the Court's actions involve cases where review has been granted in cases presenting the same issue as was granted or specified in some other case. These "trailer" cases involve a finding of "good cause" within the meaning of Article 67(b)(3),[84] but this is scarcely a guaranty that the resulting opinion (if any) will be of publishable significance or quality. In short, "good cause" need not be equated with publishability.

Another factor that should be considered is the impact of dissenting or concurring opinions on the need to publish. Professors Reynolds and Richman suggest that "few decisions with separate opinions should go

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81. PRICE OF REFORM, *supra* note 76, at 625.
82. *Id.* at n.156, *citing* Thompson, *Mitigating the Damage—One Judge and No Judge Appellate Decisions*, 50 CAL. ST. B.J. 476 (1975).
83. Another approach involves the correlation between oral argument and publication policies. A fair number of cases are decided by the Court of Military Appeals without oral argument, and in the vast majority of Court of Military Review cases the court dispenses with oral argument. *See* United States v. Willis, 13 M.J. 93, 94–95 of n.5 (C.M.A. 1982) (Everett, C.J., dissenting from denial of petition for grant of review). Of course there are argued cases that do not merit a published opinion, but one would think that a lack of oral argument would be some evidence that the resulting opinion, if any, was not likely to be of general or lasting interest. *See* United States v. Pooler, 13 M.J. 786, 789 (A.C.M.R. 1982) (on motion for reconsideration) (noting lack of request for oral argument). On the other hand, even if oral argument is held, the better course in some cases may be to rule from the bench (or after a short conference), issuing only the briefest of orders. Oral argument may, that is, show a case to be less important or complex than originally suspected.
84. 10 U.S.C. § 867(b)(3) (1976).

unpublished."[85] Given the frequency with which the Court of Military Appeals judges have issued two and three opinions in cases, this factor will serve to limit the impact of a nonpublication rule. Where, however, the separate opinion is a mere one-sentence concurrence in the result,[86] or adds little or nothing to the discussion, discretion could be exercised not to publish. The ABA Standards suggest that the author of a concurrence or dissent should decide whether it should be published, and that if the author decides in favor of publication, the majority opinion should also be published.[87] So long as it is not abused, such a rule has much to commend it.

Where should military cases be published? If the original notion that the Court of Military Appeals' dignity required a separate system has served its purpose, other, more current concerns take its place. The need for military mobility requires that a minimally adequate law library be readily transportable, often to faraway and inaccessible locations in emergency situations. While this counsels strongly against abandonment of the idea of a separate military reporter system, some steps should be taken to expand the opportunities for civilian practitioners and judges to benefit from the experience of the military courts, so that military jurisprudence can emerge from its doctrinal *cul-de-sac* and engage fully in the dialogue discussed in Part II of this article. One specific step that could be taken would be to include Court of Military Appeals and perhaps Courts of Military Review decisions in the Article III reporters on a selective basis.[88] Inclusion of military cases in the Article III reports "in addition to a specialized reporter [would give] them wider circulation and encourag[e]

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85. PRICE OF REFORM, *supra* note 76, at 612.
86. "A judge who dissents or concurs is expected to give reasons; the short statement 'I dissent' or 'I concur in the result only' is almost always meaningless and useless." R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 56 (1976). "The absence of a separate opinion to justify a vote either dissenting or merely concurring in the result of the majority opinion indicates not the presence and failure, but the absence, of collegial dialogue." F. Gindhart, *supra* note 4, at 36.
87. ABA Standards Relating to Appellate Courts, *supra* note 71.
88. On occasion, West has included judicial "strays" of one kind or another in the civilian federal reporter system. For instance, the 1979 decision of the United States Court for Berlin in United States v. Tiede, 19 Int'l Leg. Mat. 179 (1980), found its way into 86 F.R.D. 227, although it was treated there as an article, rather than a case, and was not digested. *See also* R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 812 n.7 (5th ed. 1978) (miscellaneous reporting of opinions in chambers). Court-martial appellate cases, it may be added, are occasionally reported in the civilian case reports in other countries. *E.g.*, Regina v. Bisset, [1980] 1 W.L.R. 335, 70 Crim. App. 46 (Courts-Martial App. 1979); Regina v. Swabey, [1972] 2 All E.R. 1094, [1972] 1 W.L.R. 925 (Courts-Martial App.); Regina v. Way, 1970 R.T.R. 348 (Courts-Martial App.); Regina v. Murphy, 1965 N.Ir. 138 (Courts-Martial App.); *In re* Schneider, 8 F.L.R. 314 (Courts-Martial App. 1958).

greater or broader intellectual participation in military justice matters."[89] Access to the broader audience reached by the civilian federal reporters could serve as a useful incentive towards improving the quality of military appellate opinions.

Conversely, attention might be given to the possibility of broadening the *Military Justice Reporter* to include cases arising in the Article III courts that directly involve questions of military law, since counsel will need to have these at hand along with the decisions of the Court of Military Appeals and the Courts of Military Review. This would give military counsel and courts access to pertinent authorities without necessarily having the need for a full federal library. In peacetime domestic conditions this may be a slight advantage, but wartime or emergency conditions would materially increase the benefit. Because, however, this need is currently being met by the *Military Law Reporter* (at least to the extent that it is in fact utilized within the armed services), as well as the fact that most military legal offices either possess or have ready access to the civilian federal reporters, expansion of the *Military Justice Reporter* to include military justice-related cases decided in the civilian courts need not be given high priority.

The written work product of the military courts can be divided into three categories. First, there are those materials that are so inconsequential that they are of interest only to the litigants. This category includes most motions, all reports of filings, and denials of review with respect to unreported Court of Military Review decisions. Second, there are materials of broader, lasting interest to the military community, such as full opinions on the merits or important procedural issues, or other actions accompanied by an opinion. The third category consists of materials of potential significance to the Article III and state courts and litigants therein. This category would include cases that construe portions of the Military Rules of Evidence that have not been materially altered from the civilian analogue, decisions on points of common law or trial or appellate procedure not governed by the *Manual for Courts-Martial* or Code, generic constitutional questions (i.e., those not inextricably linked to the military context), and questions of criminal law generally, such as issues of insanity or impossibility. Without suggesting that these divisions should be rigidly applied, it is suggested that the first category of materials need not be published at all, the second should be published in the *Military Justice Reporter*, and the third might be published in both the *Military Justice Reporter* and either the *Federal Reporter* (for Court of Military Appeals materials) or *Federal*

89. Reform of the Court of Military Appeals, *supra* note 21, at 44.

*Supplement* (for occasional Court of Military Review materials).[90] *Where* materials are published, however, is only the first step. The next one—far more critical—involves the accessibility of those cases that are reported.

## IV. Access to Law: The Role of the Digest.

Several factors are probably at the heart of the general inattention of the federal and state courts to military appellate case law. The first must be sheer ignorance of the fact that the military justice system generates a substantial body of jurisprudence,[91] and the repeated emphasis on the notion that military law is entirely separate from the mainstream of federal judicial activity.[92] There may also be a lingering feeling, carried over from pre-Code times, that military justice is in fact a second-rate legal system not worth the effort of researching,[93] since any precedents discovered would not be entitled to much deference. This mind-set is therefore predi-

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90. Court of Military Review opinions "tend to be less discursive and jurisprudential and certainly less seminal than opinions of major American courts of last resort." Alley, *Determinants of Military Judicial Decisions*, 65 Mil. L. Rev. 85, 108 (1974). The comparison becomes closer when district court opinions are considered, but the point seems to be essentially valid there too.
91. *See* Waltz, *supra* note 3.
92. *E.g.*, Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion) ("[m]ilitary law, like state law, is a jurisprudence which exists separate from the law which governs in our federal judicial establishment. . . ."); R. Stern & E. Gressman, *supra* note 88, at 155 (Court of Military Appeals "is a part of the government of the armed forces and is entirely separate from the judicial branch"); C. Wright, Federal Courts 13 & n.20 (3d ed. 1976) (same); D. Schlueter, Military Criminal Justice: Practice and Procedure § 1-1 (1982). *But cf.* Schlesinger v. Councilman, 420 U.S. 738, 743 & n.7 (1975) (noting conflicts between decision of Article III court and decisions of Court of Military Appeals). The language quoted above from *Burns* is particularly revealing since it proceeds from the premise that state law has no significant points of contact with the law dispensed by the Article III courts. The interaction between state and federal jurisprudence has been explored many times, *e.g.*, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 434, 485, 491, 708 (2d ed. 1973), certainly enough to demonstrate that the premise upon which the *Burns* plurality excluded military law from the canon of federal jurisprudence was in large measure mistaken. The similarities in the relationships are, indeed, quite striking. Just as the Article III courts must attempt to discern prevailing state law doctrines in diversity cases under Erie R. Co. v. Tompkins, 304 U.S. 64 (1938), the military courts regularly face the problem of discerning the rule of law generally recognized in the trial of criminal cases in the district courts. UCMJ Art. 36, 10 U.S.C. § 836 (1976 & Supp. IV 1980); Mil. R. Evid. 101(b)(1); Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 Mil. L. Rep. 6049, 6057 (1976). Reference to the common law rules of evidence is also required in military cases for points not otherwise resolved. Mil. R. Evid. 101(b) (2). Immurement of military jurisprudence within a khaki ghetto on the basis stated in *Burns* cannot be justified.
93. *Cf.* Avins, *supra* note 6, at 71 ("[t]hese controversies are only tangential to the main affliction of the Court of Military Appeals, which is that the court is turning out a

cated on a self-fulfilling prophecy. Even if a particular civilian tribunal gets past these obstacles, there may well be an impression that nothing in the military legal system is usefully transferable to other settings.[94]

And finally, there is the very practical problem that military law is still difficult to find, for both civilian practitioner and court.[95] Part of this is a function of the fact that the first quarter-century of modern military reports were produced by Lawyers Cooperative, whose work is not integrated with the more widely used National Reporter System developed by West Publishing. The digest system for *Court-Martial Reports* was "a tool of great value to the working military lawyer,"[96] which many military practitioners wish were in use for cases currently decided.[97] From the perspective of the typical civilian practitioner, however, the major research tools—aside from the *United States Code Service*, which includes annotations to C.M.A. and C.M.R.—did not afford access to this body of law.

To some extent, this deficiency is being addressed by West. For example, West's extremely useful *Federal Case News* includes brief summaries of decisions of the Court of Military Appeals. *Corpus Juris Secundum* (which still cites to neither C.M.A. nor C.M.R.) now includes some citations to West's *Military Justice Reporter* in the 40-page portion of the "Armed Services" subject entitled *Administration of Military Justice; Courts and Proceedings*, in volume 6, as revised in 1975. The 1981 cumulative annual pocket part to that volume also includes library references to key numbers in West's Military Justice topic, although these references are so broad as to be not much help to the practitioner. No references are

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second-rate work product substantially below the minimum in both learning and analysis, which should be required of every judicial tribunal, especially the court of last resort working in a specialized field").

94. The "oddit[ies] of military practice," United States v. Breese, 11 M.J. 17, 24 (C.M.A. 1981) (Cook, J., concurring in part and dissenting in part), cannot be denied. The difficulty is that they have been permitted in large measure to color the thinking of civilian lawyers and judges, and reinforce the impression referred to in the text. It matters not whether the system created under the Code has more similarities to civilian practice or more points of difference. The important point is that the points of similarity are numerous and pervasive.
95. *See* Waltz, *supra* note 3.
96. Hartnett, *supra* note 2, at 377. Strictly speaking, the C.M.R. Citator and Index volumes "are not true digests but are 'index-digests' with descriptive-word analysis under broad subject headings." M. PRICE, H. BITNER & S. BYSIEWICZ, EFFECTIVE LEGAL RESEARCH 216 (4th ed. 1979).
97. Steps are being taken within the Air Force to provide an index to Court of Military Appeals and Air Force Court cases reported in the *Military Justice Reporter* in a manner comparable with that previously employed by Lawyers Co-operative. Beginning with 11 M.J., the Office of the Judge Advocate General is reviewing these cases with a view to generating an index similar in form to the headings used in the indices to *Court-Martial Reports*. Prior volumes will be indexed on a LIFO basis. Three levels of indexing will be

given to C.M.A. or C.M.R., thus making cases reported there casualties of the shift to West.

Case digests have been called "the traditional beginning point and certainly one most specifically designed as a case finder."[98] Despite the fact that direct use of the digest method of legal research "requires a certain amount of legal sophistication,"[99] many legal researchers are able to proceed directly to these digests when conducting research, and thus the deficiencies in the legal encyclopedia area might not be thought severe. The purpose of a case digest is to permit "convenient access to the current decisional law of the Federal Courts."[100] "By bringing together all headnotes bearing the same topic and key number, the digest provides in one place summaries and citations to all cases in that advance sheet which deal with the same legal principle."[101]

The digests for current military cases are, however, extremely deficient, and only perpetuate the isolation of military law. The shortcomings are of several types.[102] Cases reported in the *Military Justice Reporter* are digested only to key numbers in the Military Justice topic. Obvious opportunities for digesting to other non-Military Justice topics are passed up on a regular basis. Although a separate digest topic for points of military law was specified in the Defense Supply Service's "Request for Quotations" that led to the *Military Justice Reporter*, West's Military Justice topic analysis is so general and unreflective of the issues commonly addressed in military decisions that it offers little practical help to researchers—particularly those who are unfamiliar with the military justice system. Finally, the meager cross-referencing table intended to lead the user of the Military Justice digest to analogous points of law covered in other National Reporter System digest topics is virtually worthless; among other things, it

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provided, versus the four-level system used in the C.M.R. index. Initial distribution will be limited to the Air Force. Telephone conversation with Colonel Myron L. Birnbaum, Office of the Judge Advocate General of the Air Force, June 4, 1982. Such a system may well make the materials reported in the *Military Justice Reporter* more accessible to military practitioners (certainly a desirable objective), but will have no direct effect on the accessibility of such materials to civilian courts and practitioners.

98. M. COHEN, LEGAL RESEARCH IN A NUTSHELL 65 (1978); *see also* M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 96, at 191 ("case digest is the lawyer's indispensable tool").
99. J. JACOBSTEIN & R. MERSKY, FUNDAMENTALS OF LEGAL RESEARCH 83 (2d ed. 1981).
100. Preface to West's Federal Practice Digest 2d III (1981). West's Law Finder 10 (1978) claims, somewhat extravagantly, that "[t]he Key Number classification provides access to all other American cases on the points of law dealt with in the headnotes through West Key Number Digests". *See also id.* at 17.
101. M. COHEN, *supra* note 98, at 75.
102. For critiques of West's digesting generally see *id.* at 79–80; M. MAYER, THE LAWYERS 431–33 (1967). In addition to systemic problems, the digester's headnote may simply misinterpret the court's opinion. *See* Burbank v. Ernst, 232 U.S. 162, 165 (1914); United States v. Detroit Lumber Co., 200 U.S. 321, 337 (1906); United States v. Little Rock

even fails to refer the reader to any of the key numbers under the Armed Services topic. A few illustrations will demonstrate the shortcomings, although one suspects that readers who have attempted to use the Military Justice digest as a pathway to decisions of the Article III and state courts will already agree with these general observations, and perhaps will have their own favorite illustrations of breakdowns in the research system.

First, let us look at the total mass of cases reported in the *Military Justice Reporter* to date. In those 12-plus volumes, covering hundreds of decisions and thousands of headnotes, West has jammed all but three of its headnotes into the Military Justice topic. The exceptions relate to isolated points in three Court of Military Review decisions, and refer the reader to Kidnapping key number 1,[103] Courts key number 100(1),[104] and Armed Services key number 59.[105] There is no way to explain why these and these alone were singled out for treatment in this fashion, except that the last of these strays appears to have been a ministerial error, and that the editors must have intended to digest the case to Military Justice key number 59, rather than Armed Services key number 59. Not a single point of law is digested directly to such obvious pre-existing West topics, such as Appeal and Error, Attorney and Client, Constitutional Law, Criminal Law, Evidence, Indictment and Information, International Law, Motions, Statutes or Witnesses.

To illustrate how the West system is building a digester's wall around military case law, a few examples can be furnished. In *United States v. Hand*,[106] the Court of Military Appeals accepted a government confession of error, with a brief discussion of the point in its per curiam opinion. The only headnote furnished with the opinion referred the researcher to Military Justice key number 300. That key number is described as "Hearing; opportunity for rebuttal" under the larger category of "Review of Courts-Martial." It would have been far preferable to digest this case under Criminal Law key number 1186(6), which is described as "Confession of error." This was the key number used, for example, in the West editors'

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Sewer Comm., 460 F. Supp. 6, 8 n.2 (E.D.Ark. 1978); J. JACOBSTEIN & R. MERSKY, *supra* note 99, at 98; M. PRICE, H. BITNER & S. BYSIEWICZ, *supra* note 96, at 193.

103. United States v. Cuevas-Ovalle, 6 M.J. 909 (A.F.C.M.R. 1979).
104. United States v. Deavers, 7 M.J. 677 (A.C.M.R. 1979).
105. United States v. Chodkowski, 11 M.J. 605 (A.F.C.M.R. 1981).
106. 11 M.J. 321 (C.M.A. 1981).

treatment of *Sibron v. New York*.[107] At the time *Hand* was decided, the cross-reference table "Military Justice to Other Topics" had no entry for Military Justice key number 300, and even today, the cross-references that have been added to the table for key number 300 do not include Criminal Law key number 1186(6). An explanatory note observes that "[o]mission of a Military Justice Key Number indicates no useful parallel," but cautions that "[t]he table does not preclude the possibility of relevant analogous cases in other Key Numbers."

A second example begins with a civilian court case, *Hatheway v. Secretary of the Army*.[108] The case involved a collateral attack on a conviction under Article 125,[109] and resulted in a decision sustaining that provision against a claim of unconstitutionality. The pertinent headnotes in the Ninth Circuit's opinion are numbers 9 and 10. The first is double-digested to Armed Services key number 36 ("Offenses by persons in armed services; In general") and Constitutional Law key number 84 ("Religious liberty and freedom of conscience"). In the course of setting forth the procedural history of the case, the Court of Appeals noted that the Court of Military Appeals had affirmed Hatheway's conviction "without articulatng its analysis of the issues, except to cite *United States v. Scoby*, 5 M.J. 160 (C.M.A. 1978) (upholding Article 125 as applied to acts committed in a public place)."[110] This being the case, one might have expected that *Scoby* would have been digested in a manner that would correlate with the digest treatment of the analogous point later in the *Hatheway* opinion. *Scoby*, however, is digested (with respect to the constitutionality of Article 125) to Military Justice key number 3 ("Validity of Code Articles"). This, in turn, is correlatd by West's table to Criminal Law key number 13.1 ("Statutory provisions; Certainty and definiteness"). *Scoby* and *Hatheway* thus never meet in West's system except for the Ninth Circuit's citation. Indeed, *Hatheway* itself, which would fit neatly into Military Justice key number 3, will never appear there, since the Military Justice digest topic is defined by West's "Scope-Note" to include "[t]he system of justice for the government of the armed forces of the United States and persons under their control *as determined by decisions of military courts*."[111]

Another case illustrates the interplay between the rules applied by the Supreme Court and the Court of Military Appeals where a petitioner for certiorari or grant of review, respectively, dies while the petition is pend-

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107. 88 S.Ct. 1889, 1900 (1968).
108. 638 F.2d 886, 889 (5th Cir.), *cert. denied*, 452 U.S. 909 (1981).
109. 10 U.S.C. § 925 (1976).
110. 641 F.2d at 1379.
111. *See* 58 WEST'S FEDERAL PRACTICE DIGEST 2d 715 (1981) (emphasis added). Civilian court decisions relsting to military justice appear under the Armed Services topic. 3 *id.* 1 (1981).

ing. In *Dove v. United States*,[112] the Supreme Court held that in such a case, the petition should be dismissed. The one-paragraph per curiam decision is digested to Criminal Law key numbers 303 ("Discontinuance") and 1070 ("Parties"). The decision overruled *Durham v. United States*,[113] which was also digested, *inter alia*, to Criminal Law key number 303.

A similar (but not identical) issue arose in the Court of Military Appeals in *United States v. Kuskie*,[114] where a petition for grant of review was denied after the petitioner's death, but before the Court learned of the death. Declining to follow Supreme Court practice, a majority of the Court voted to grant a motion to set aside the findings and sentence because of the petitioner's demise. The pertinent headnotes were indexed to Military Justice key number 333 ("Review by Court of Military Appeals, matters peculiar to"). West's cross-reference table correlates that key number to Criminal Law key numbers 1178 and 1179, neither of which is employed in the digesting of *Dove* or *Durham*. *Kuskie* will perhaps be found through the Military Justice topic digest, or by shepardizing *Dove*, but the digest system will not lead the researcher from *Dove* to *Kuskie*.

Finally, in *United States v. Fimmano*,[115] one of the more short-lived decisions in the history of military or common law,[116] a majority of the Court of Military Appeals ruled that the Fourth Amendment requires that searches in the military be authorized only on oath or affirmation, overturning doctrine of long standing. The case is digested to Military Justice key number 6, 30 and 40 ("Rules of decisions; stare decisis and retrospective decisions," searches and seizures "In General," and "Probable cause; affidavits or other information"). These are not inappropriate digest headings given the tenor of the Court's holding, but one must wonder whether the matter would not have been better handled by some digesting, at least, to the topics applied to an analogous holding in the civilian courts.

Quite obviously, the ability of a decision to influence other courts and contribute to the growth of the law should be principally a function of the *quality* of the opinion—whether it displays the judicial craftsmanship, care and thoughtfulness that other judges look for when seeking "authority." Another is the ability of a particular opinion to command adherence on the

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112. 423 U.S. 325 (1976) (per curiam).
113. 401 U.S. 481 (1971).
114. 11 M.J. 253 (C.M.A. 1981).
115. 8 M.J. 197 (C.M.A. 1980).
116. Fourteen months and one change of personnel later, the Court of Military Appeals overruled *Fimmano* in United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981). *Compare* West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), *with* Minersville School Dist. v. Gobitis, 310 U.S. 585 (1940), *and* Robbins v. California, 453 U.S. 420 (July 1, 1981) (judgment announced in plurality opinion of Stewart, J.), *with* United States v. Ross, 102 S. Ct. 2157 (June 1, 1982).

court in which it is announced.[117] However one views the body of military case law from these perspectives, it is clear that with digesting such as is currently being provided, it should come as no surprise that the body of military law—"prime source of guidance in the field of criminal jurisprudence" though it could be,[118] is tapped little better today than it was twenty years ago. The current digesting deficiencies—at least some of which are attributable to the government's desire to have a separate digest topic for military law—thwart one of the chief potential benefits of the transfer of military case reporting to the West system.

## V. Recommendations.

As between digesting and publication, the former presents the more compelling case for reconsideration. Since the two are related, however, from a practical standpoint, they should be addressed at the same time. These issues deserve careful study, and the views of all concerned should be solicited and taken into account. Other solutions may appear as a result of that study; what follows are the author's suggestions for change.

The overall conclusions drawn from the discussion in the preceding sections of this article are (1) that the tools of legal research should be reorganized to improve the accessibility of military case law for all concerned (military and civilian, judges and practitioners), and (2) that the body of military case law should be critically reviewed to ensure that only those materials of lasting interest to the legal community will be included within the reporter system.

Specific recommendations that should be considered by the Code Committee, the bench, bar and scholarly community, include the following:

1. As to the publication program—
   a. The *Military Justice Reporter* should be retained
   b. Cases of unusual importance should be published in the *Federal Reporter* (for Court of Military Appeals cases) and *Federal Supplement* (for Court of Military Review and any deserving trial court cases) as well as in *Military Justice Reporter*. Motion

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117. A significant number of cases decided by the Court of Military Appeals have lacked a majority holding. F. Gindhart, *supra* note 4, at 59. Three-way splits have periodically been noted by courts and scholars. *E.g.*, Middendorf v. Henry, 425 U.S. 25, 43 (1976); Doe v. Renfrow, 475 F. Supp. 1012, 1018 n.9 (N.D. Ind. 1979); United States v. Moderacki, 280 F. Supp. 633, 636 (D. Del. 1968); *Recent Case*, 82 Harv. L. Rev. 483, 484 (1968). The incidence of triple opinions—particularly in major cases, *e.g.*, Cooke v. Orser, 12 M.J. 335 (C.M.A. 1982); Wickham v. Hall, 12 M.J. 145 (C.M.A. 1981)—has a debilitating effect on the Court's ability to make itself heard.

118. Waltz, *supra* note 3.

practice entries and reports of mere filings should be excluded from the published proceedings of the Court of Military Appeals

c. In general, opinions should be published only when appropriate under the ABA Standards Relating to Appellate Courts

d. Summary dispositions should, if unaccompanied by a significant dissenting or concurring opinion, be relegated to a table format

e. Motion practice entries and reports of mere filings should be excluded from the published proceedings of the Court of Military Appeals

f. The limited publication policies of the Courts of Military Review should be made uniform and incorporated in the rules promulgated under Article 66(f)[119]

g. The rules of the Court of Military Appeals and the Courts of Military Review should be amended to preclude citation to unpublished decisions unless a copy is simultaneously furnished to opposing counsel

2. As to the digesting program—

a. The Military Justice topic should be discarded and all cases heretofore keyed to it retrospectively redigested to appropriate pre-existent topics

b. If the Military Justice topic must be retained, it should be critically reviewed and expanded to take into account headings that more accurately reflect the shape of the military justice system, and all military cases should be double-digested to that topic as well as appropriate non-military topics

c. West key numbers should in any event be retrofitted to cases reported in the *Court-Martial Reports* and *United States Court of Military Appeals Reports*

The present digesting arrangements treat military justice as both a *jurisprudence* and a *jurisdiction*. The ambivalence is understandable because the military justice system undeniably has both aspects. If one focuses on the system's jurisprudential aspect, a separate digest topic has much appeal, albeit at some expense in doctrinal interplay with other criminal appellate courts. Viewing the military as a jurisdiction, however, avoids that problem, and suggests the need simply for a separate reporter and cumulation of headnotes (as is done in the various state digests). Taking the state reporter and digest systems as a model, even if the Military Justice topic were abandoned in favor of employing the full range

119. 10 U.S.C. § 866(f) (1976).

of appropriate West topics and key numbers (as suggested here), it would be entirely logical to maintain a separate Military Justice Digest to collect the headnotes of all cases reported in the *Military Justice Reporter*. In this way, the Armed Services' need for a separately purchasable volume giving convenient access to military decisions could be met without the isolative side-effects of the current Military Justice topic.

These suggestions may entail copyright or contractual questions. If so, an effort should be made to resolve such issues, even though additional expense may result. With regard to the proposal for redigesting, it should be noted that West has in the past redigested when expanding old topics or adding new topics to its system.[120]

As previously suggested, the real test of a court's ability to influence other tribunals rests with the quality of its work product. This factor should not prevent those responsible for administration of the military justice system from taking reasonable steps to facilitate civilian access to the body of military jurisprudence. Adoption of the proposals suggested here would result in a reporting system that better meets the needs of the military while also encouraging increased access by civilian lawyers and judges to this body of law, and thus, increased cross-fertilization between it and the other systems of American law.

## VI. Conclusion.

The last several years have been a time of ferment within the military justice system. Congresssional interest in the subject—often in eclipse[121]—has rarely been higher.[122] Major revisions of the *Manual for Courts-Martial* have been undertaken[123] and, in the case of the Military

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120. M. Cohen, *supra* note 98, at 80; M. Price, H. Bitner & S. Bysiewicz, *supra* note 96, at 233; E. Pollack, Fundamentals of Legal Research 73 (J. Jacobstein & R. Mersky 4th ed. 1973). Double-digesting a single point of law to more than one topic is also an accepted practice. J. Jacobstein & R. Mersky, *supra* note 99, at 68.

121. *E.g.*, Cooper & Cooke, *supra* note 3, at 1365; *see also* Fidell, *supra* note 3 (lack of congressional overright regarding Military Rules of Evidence and other changes to MCM); W. Generous, *supra* note 18, at 55 (lack of congressional interest in annually submitted pre-Code Army MCM).

122. *See, e.g.*, Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat. 1085 (1981); Military Pay and Allowances Benefits Act of 1980, Pub. L. No. 96-579, § 12(a), 94 Stat. 3369 (1980); Department of Defense Authorization Act, 1980, Pub. L. No. 96-107, § 801, 93 Stat. 810 (1979); *see also* H.R. 8188, *supra* note 22.

123. A comprehensive revision of the *Manual* is currently in progress. Since January 1, 1980, the *Manual* has been the subject of five amending Executive Orders. Exec. Order No. 12,340, 47 Fed. Reg. 3,071 (1982); Exec. Order No. 12,315, 46 Fed. Reg. 39,107 (1981); Exec. Order No. 12,306, 46 Fed. Reg. 29,693 (1981); Exec. Order No. 12,233, 3 C.F.R. 276 (1981); Exec. Order No. 12,198, 3 C.F.R. 151 (1981).

Rules of Evidence, brought to fruition.[124] Steps have been taken to ensure a deceleration in the turnover problem at the Court of Military Appeals,[125] with, one hopes, an increase in doctrinal stability on that important tribunal.

These events may augur a new phase in the history of military justice under the Code in which the appellate courts may, building upon the foundation laid over three turbulent decades, begin to turn their attention to subtler issues of judicial craft and administration. One part of this evolution is manifest in the Court of Military Appeals' current task of thoroughly revising the Rules of Practice and Procedure, employing, for the first time, a Rules Advisory Committee.[126] Other aspects of the Court's work could also profitably be reexamined, such as the Court's policy on publication of opinions and miscellaneous actions. The need for publication of all opinions as well as the complete Daily Journal is not apparent, and runs counter to the trend in other appellate courts in the United States. More importantly, the current arrangements for digesting military appellate decisions perpetuate the system's isolation from the mainstream of American appellate jurisprudence, and deprive the other systems of criminal justice of a potentially useful additional perspective.[127] Robust interaction with the other two systems would serve the public interest and could be achieved without compromising proper concerns about tailoring the military justice system to military realities and needs. Reasonable efforts

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124. Exec. Order No. 12,198, *supra* note 123.

125. *See* Military Pay and Allowances Benefits Act of 1980, *supra* note 122.

126. *See A Look at Chief Judge Robinson O. Everett*, *supra* note 36, at 35. The Rules Advisory Committee's proposed changes, as revised by the Court, were released for comment at the Seventh Annual Homer Ferguson Conference on Appellate Advocacy in May 1982. The Courts of Military Review Rules were revised—less extensively—in 1981. 10 M.J. LXXIX. *See generally* Fidell, *supra* note 3, at 1282.

127. Another step that could be considered from the standpoint of aiding civilian courts confronted with unsettled issues of military law would be institution of a mechanism for certification of issues to the Court of Military Appeals by state and federal courts. A number of states have created interjurisdictional certification systems by rule of court, while others have passed legislation for this purpose. *See* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4248, at 525 n.29 (1978 & Supp. 1981). Whichever approach is adopted, the result would be increased uniformity in the law. *See generally* E. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES COURT OF MILITARY APPEALS 72–73 & nn.268–71 (1978). While such a procedure would not directly advance the purpose of "reduc[ing], if not eliminat[ing], the occasions for a servicemember to resort to a federal district court for relief in matters involving military justice," Wickham v. Hall, 12 M.J. 145, 155 (C.M.A. 1981) (Everett, C.J., dissenting), it would at least reduce the opportunity for divergent results, and with it, the

to improve and foster that interaction are a natural outgrowth of the progress made since the inception of the West *Military Justice Reporter* and Shepard's *Military Justice Citations*, and should be undertaken at the first opportunity. The need for such measures has been recognized by the Court;[128] they merit the active support of the bar.

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incentive for forum shopping as between the military and civilian Federal court systems or, for that matter, among civilian Federal courts.

128. Letter from Chief Judge Robinson O. Everett to Ernest H. Fremont, Chmn., ABA Standing Comm. on Military Law (Aug. 27, 1982) (urging publication of C.M.A. opinions in *Federal Reporter* and improved digesting to increase accessibility).

# The Iranian Hostages Crisis: International Law & United States Policy*

*Major James P. Terry, USMC***

*The 1979 seizure of American diplomatic and military personnel in Iran focused world attention on the unique status and vulnerability of embassy personnel. In this article, Major Terry examines the development of the hostage crisis and the many attempts undertaken to resolve it through existing mechanisms of international law. His examination includes a discussion of historical and political roots underlying the crisis, a critique of the various American responses, an analysis of the central legal and policy issues, and finally a number of observations about American crisis diplomacy in the future.*

## I. Historical and Political Background.

The November 1979 seizure of 66 American diplomats and Embassy personnel in Tehran[1] by militant Iranian students was not without precedent. The rapid support given this takeover by the Islamic Republic of Iran and its leaders, however, added a new and sinister dimension to the scope of state terrorism. The United States responded to Iran's hostage-related claims in a number of ways, including diplomatic and political initiatives,

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*This article has been adapted from a paper submitted as part of an LL.M. program in International and Comparative Law. The original paper contained a number of useful documentary annexes which, due to space limitations, could not be included with the present article. These documents include the Declaration of the Government of the Democratic and Popular Republic of Algeria; the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran; Executive Order 12276 through 12285; Executive Order 12294; and the complete series of Treasury regulations regarding Iranian assets restrictions on the property of the former Shah (31 C.F.R. § 535 (1981).

**Major James P. Terry, USMC, currently is assigned to the Third Marine Division as Judge Advocate. B.A., University of Virginia, 1968; J.D., Mercer University, 1973; M.Ed. in Counselor Education, University of Virginia, 1976; LL.M. and S.J.D. in International Law, George Washington University, 1980 and 1982 respectively. He is admitted to practice before the bar in Georgia and the United States Court of Military Appeals.

1. Thirteen of the original American hostages were released on 20 November 1979—eight Black Americans and five women. Three United States diplomats present at the Iranian Foreign Ministry on 4 November 1979 were subsequently informed that their protection

application to international public bodies, economic measures, an aborted attempt at humanitarian intervention, and finally an economic settlement driven by the prospect of a more conservative Reagan administration.

Throughout the dispute, both countries attempted to invoke norms of international law as justification for their respective claims and actions. This article examines the juridical aspects of this incident and its impact on customary international law.

A. *The Pahlavi Regime*. Active United States involvement in Iran can be traced to June 1941. After the German invasion of Russia, the Allies saw a need for an overland supply line to the Russian front through Iran.[2] Reza Shah, the Shah of Iran who had ascended to power in 1925 by vote of the Majlis (Assembly) and a constitutional amendment, openly opposed the plan.[3] Anglo-Soviet forces, with American support, then occupied Iran.

Three months later, in September 1941, Reza Shah abdicated and went into exile on the island of Mauritius. His 21-year-old son, Mohammed Reza Pahlavi, supported by the British forces, then ascended to the throne.[4] During the course of the war, British and Soviet occupation forces split the kingdom, with the Soviets controlling the north and the British the south. The British and Soviet occupation nearly destroyed the Pahlavi State. The regime was politically discredited for its failure to resist the two foreign armies of occupation and was also undermined when occupying British forces restored political freedom to opposition parties.[5]

The Shah reestablished control over the country after the war primarily due to President Truman's determination to prevent a communist takeover in Iran. In his memoirs, Truman wrote that "Russian activities in Iran threatened the peace of the world." He stressed, moreover, that "if the Russians were to control Iran's oil, either directly or indirectly, the raw material balance of the world would undergo serious damage and it would

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could not be assured should they leave the Foreign Ministry, and they came to be considered hostages as well.

2. F. HALLIDAY, IRAN DICTATORSHIP AND DEVELOPMENT 24 (1979).
3. A. SAIKAL, THE RISE AND FALL OF THE SHAH 25 (1980). Saikal explains that Reza Shah desired to maintain Iranian neutrality and also preserve his friendship with Germany. Prior to World War II, Reza was able to maintain this desired neutrality by playing the traditional rivals, Britain and Russia, against one another. When the need for a common defense against Germany forced the two into an alliance, this was no longer possible. *Id.* at 25–26.
4. W. FORBIS, FALL OF THE PEACOCK THRONE 50 (1980). Forbis relates that the young monarch had almost no power "and what power he had mattered little either to Iran or to the World." *Id.*
5. F. HALLIDAY, *supra* note 2, at 24. Halliday details the restoration of trade unions, free press, and rival political parties which had not been in evidence since the days of the Constitutional Revolution of 1905–1911. While the nation was divided by British and Soviet forces, Tehran was jointly controlled with British officials responsible for administration. *Id.* at 22–23.

be a serious loss for the economy of the Western world."[6] Following the withdrawal of Soviet troops, the Roosevelt and Truman administrations provided the assistance necessary for the Shah to crush the communist Tudeh opposition in the Azerbaijan and Kurdistan provinces.[7] The leadership of the newly appointed Premier Ahmad Qavam was equally significant in securing the repudiation of an Irano-Soviet Oil Agreement in October 1947.[8]

From 1947 to 1951, the leader of the Majlis was Dr. Mohammed Mossadegh. At nearly seventy years of age, Dr. Mossadegh enjoyed support inside and outside the Majlis through a coalition called the National Front.[9] The National Front, a loose aggregation of diverse factions, advocated not only Iranian ownership and control over the indigenous oil industry but also an end to British economic control.[10] As leader of the oil protest movement, which sought an end to British ownership of the Anglo-Iranian Oil Company, Mossadegh was elected Prime Minister by the Majlis in 1951 and approved by the Shah in a move to placate the growing mood of nationalism.[11]

In an attempt to diminish British influence in Iran, Mossadegh immediately sought improved Soviet relations and then took steps to nationalize British petroleum interests. These moves frightened the Shah, who feared the Soviet influence more than the British; they also infuriated then newly-elected President Eisenhower, who was well aware of the recent American financial investment in Iran and who had campaigned on a platform advocating global opposition to communism.[12] Mossadegh appealed directly to President Eisenhower in May 1953 for economic assistance against Iran's "great economic and political difficulties" caused "by the former British company and the British government." Eisenhower refused. Later, he wrote that in the wake of the

> failure of Iran and of the United Kingdom to reach an agreement with regard to compensation . . . it would not be fair to American taxpayers for the United States Government to extend any considerable amount of economic aid to Iran as long as Iran had access to funds derived

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6. 2 H. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE, 1946–1952, at 94–95 (1956).
7. A. SAIKAL, *supra* note 3, at 35.
8. As a result, Iran became further dependent upon the United States for its protection against any further Soviet reaction. The Majlis, which led the fight against Soviet influence in October 1947, were led by Dr. Mohammed Mossadegh. Dr. Mossadegh later headed up the 1951–1953 reformist government which was considered by the United States as dangerously sympathetic to the Soviets. *Id.* at 36–38.
9. W. FORBIS, *supra* note 4, at 56.
10. *Id.*
11. *Id.* at 57.
12. A. SAIKAL, *supra* note 3, at 44.

from its own resources.[13]

Although Mossadegh was not himself a communist, he was seen as opening the door to communist influence.[14] Mossadegh incorrectly believed that the nationalization of the Anglo-Iranian Oil Company would have Western nations begging for Iranian oil. To the contrary, other sources were found and the Iranian economy floundered.[15] In the spring of 1953, Mossadegh sensed that he was losing control and he responded with a crackdown. First he dissolved Parliament, then muzzled the press and finally allied himself with the communist Tudeh Party.[16] Claiming emergency powers, Mossadegh next attempted to usurp the Shah's constitutional position as commander of all Iranian military forces.[17] As a result, the National Front which Mossadegh had so carefully forged from disparate groups began to unravel. Most significantly, the Ayatollah Kashani withdrew his religious contingent to protest Prime Minister Mossadegh's link with the communists.[18]

It was at this point that the initial American intervention, so strongly decried by the present Iranian leadership, is alleged to have occurred. In August 1953, the Shah unsuccessfully attempted to replace Mossadegh with General Fazlollah Zahedi, an Iranian hero who had been severely wounded while fighting the Russians in Azerbaijan in 1921. When Mossadegh arrested both the emissary who carried the decree which ordered Mossadegh out of office and the senior military officers loyal to the throne, the Shah fled the country.[19] Central Intelligence Agency Middle East operations chief Kermit Roosevelt took advantage of the communist Tudeh Party's celebration following the Shah's departure.[20] The swelling Moslem fear that Mossadegh represented communist elements allowed Roosevelt and his agents to organize a massive pro-Pahlavi demonstration on August 19, 1953—a mere four days after Mossadegh's counter-coup.[21] This demonstration grew quickly into a massive anti-Mossadegh movement. Gen-

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13. D. EISENHOWER, MANDATE FOR CHANGE, 1953–1956, at 161–162 (1963).
14. F. HALLIDAY, *supra* note 2, at 25.
15. A. SAIKAL, *supra* note 3, at 41.
16. P. AVERY, MODERN IRAN 416 (1965).
17. B. NIRUMAND, IRAN: THE NEW IMPERIALISM IN ACTION 73–86 (1969). *See also* AVERY, *supra* note 16, at 420–439 for a discussion of these events.
18. *Id.*
19. W. FORBIS, *supra* note 4, at 59.
20. *Id.*
21. In order to secure a large crowd in the pro-Pahlavi demonstrations, American CIA operative Kermit Roosevelt provided trusted pro-Shah activists with stacks of ten-rial bills (then equivalent to 15 cents). These American bribes were given to anyone who would join the demonstration for the Shah and against Mossadegh. The initial surge provided by these paid demonstrators encouraged the Shah's real partisans, Moslems

eral Zahedi's troops easily established order in the Shah's name and Mossadegh was arrested, tried, and imprisoned.[22]

Although the United States, specifically the Central Intelligence Agency, played an active role in organizing the August 1953 coup that ousted Mossadegh, it is misleading to hold the United States primarily responsible. Reality and present Iranian claims do not exactly correspond. In 1953 Mossadegh was the third largest Iranian landowner with holdings valued at over one hundred million dollars.[23] Although he desired economic independence from Great Britain, at the same time he opposed the Shah's proposed land reform program which enjoyed popular support among the lower classes. These factors, together with Iran's sinking economy, figured far more significantly in the coup than did the efforts of the United States.

B. *Tracing American Involvement*. Notwithstanding the allegation of complicity in the overthrow of the Mossadegh regime, the most prominent feature of the Iranian claim is the charge that the United States involved itself in "more than 25 years of continual interference . . . in the internal affairs of Iran, the shameless exploitation of [the] country and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms."[24] The United States' role in Iran after 1953 has a critical bearing on the legal claims asserted by the Iranian Government during the hostage crisis.[25]

Following the counter-coup in 1953, Mohammed Pahlavi consolidated his power and established a martial law government under General Zahedi.[26] Ongoing opposition from the National Front, the communist Tudeh Party, the clergy, and anti-monarchist tribes in southern Iran left the Shah with little choice but to seek additional American assistance to buffer the disturbed Iranian economy and the weakness of the armed forces.[27] The United States responded with a full commitment to the Shah's regime.[28] The American purpose was to strengthen its influence in

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and merchants disillusioned by Mossadegh and traditionalists who had always favored the monarchy. *See* D. WISE & T. ROSS, THE INVISIBLE GOVERNMENT 110–112 (1964) for a full discussion of these events.

22. W. FORBIS, *supra* note 4, at 60.
23. *Id.*
24. Letter from Islamic Republic of Iran (December 9, 1979) to International Court of Justice, *quoted in* Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. General List No. 64, at 18 [hereinafter cited as United States v. Iran].
25. United States v. Iran, *supra* note 24, paras. 80–82, at 35–36.
26. A. SAIKAL, *supra* note 3, at 47.
27. *Id.*
28. *Id.* at 48.

Iran,[29] a nation both rich in oil and strategically important as a front line of defense against the Soviet Union.[30] In exchange for the Shah's commitment to long-term American involvement in the Iranian economy and the process of social reform, the Eisenhower administration instituted a program of grants, technical assistance, and other economic aid. Between 1953-57 this program provided the Iranian government with 366.8 million dollars in aid.[31] The cost to Iran, however, was considerable. In the Oil Agreement of 1954, a consortium of Western oil companies took over operation of the Iranian oil industry: Iran received half of the profits and Western companies shared the other half. In announcing the agreement in the Majlis, the Shah described it as the best he could secure, given Iran's tenuous domestic situation and regional position.[32]

During the decade following the counter-coup, the level of American military aid paralleled the economic aid already described. Iran received 535.7 million dollars in defense grants-in-aid, and more than 10,000 United States personnel were stationed in Iran.[33] No one pretended that this was necessary to meet Iran's border defense needs: the Iranians had nothing to fear from the Soviet Army, and the foes against which the Shah armed himself were those inside, not outside, the country. In 1965 Theodore Sorensen wrote:

> In Iran the Shah insisted upon our supporting an expensive army too large for border incidents and internal security and of no use in an all-out war. His army . . . resembled the proverbial man who was too heavy to do any light work and too light to do any heavy work.[34]

In 1957, the Central Intelligence Agency helped the Shah's government establish the Iranian State Intelligence and Security Organization (Sazman-e Ettela 'at Va Amniyat-e Keshvar, or SAVAK) to alleviate the very problem Sorensen had noted. SAVAK, under the Shah's direct control, soon grew to become a powerful and brutal force in running the affairs of state.[35]

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29. *See* 29 U.S. DEP'T OF STATE BULL. No. 742, at 349 (Sept. 14, 1953).
30. For a delineation of the basic U.S. interests and objectives in Iran in this period, *see* J. CAMPBELL, DEFENSE OF THE MIDDLE EAST: PROBLEMS OF AMERICAN POLICY 162–163 (1960).
31. U.S. OFFICE OF STATISTICS AND REPORTS, INTERNATIONAL ADMINISTRATION, FOREIGN ASSISTANCE AND ASSISTANCE FROM INTERNATIONAL ORGANIZATIONS, July 1, 1945–July 30, 1966, at 12 [hereinafter cited as U.S. OFFICE OF STATISTICS AND REPORTS].
32. A. SAIKAL, *supra* note 3, at 49.
33. Testimony of Marvin Zonis, *Hearings: New Perspectives on the Persian Gulf, before House Comm. on Foreign Affairs*, 95th Cong., 1st Sess. at 105 of Committee print (1973).
34. T. SORENSEN, KENNEDY 628 (1965).
35. M. ZONIS, THE POLITICAL ELITE OF IRAN 115 (1971). For details of SAVAK's organization and operations, *see Hearings, Human Rights in Iran, before House Subcomm. on*

Through the late 1960's and into the 1970's, high military and security expenditures continued, with the United States often encouraging purchases of advanced technical equipment which to a large degree the Iranians neither needed nor were fully trained to use.[36]

Despite the darker aspects of American post-1953 involvement in Iran, there was also a bright side. The United States did attempt to moderate the Shah's relationship with his people—a matter the present Iranian leadership expediently overlooks. In January of 1957, the House Committee on Government Operations expressed its concern both over the manner in which the Shah's government was using United States aid and also over the lack of American oversight.[37] President Eisenhower, in a speech before the Iranian Parliament in December 1959, hinted that it was not military strength alone that ensured stability and a just peace. In his estimation,

> the spiritual and economic health of the free world must be likewise strengthened . . . While we must, at whatever cost, make freedom secure from any aggression, we could still lose freedom should we fail to cooperate in the progress toward achieving the basic aspirations of humanity.[38]

It was left to the Kennedy Administration, however, to press both for socio-economic reforms and for the relaxation of political repression. The United States established a task force to monitor these efforts. It promised an additional thirty-five million dollars in aid for the troubled Iranian economy if the Shah would appoint the reform-minded economist Ali

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*International Organizations*, 96th Cong., 2d Sess. at 7–8, 14–16, 37–52, and 70–83 of Committee Print (1973).

36. *See* STAFF REPORT, U.S. MILITARY SALES TO IRAN, PREPARED FOR HOUSE SUBCOMM. ON SECURITY ASSISTANCE, 96th Cong., 2d Sess. (1976).

37. U.S. CONGRESS, HOUSE OF REPRESENTATIVES, COMM. ON GOVERNMENT OPERATIONS, FIRST REPORT, U.S. AID OPERATIONS IN IRAN, at 3–4 (Jan. 28, 1957). The report concluded:

> The conduct of the United States operations mission appears to have been based on the assumption that as long as United States aid funds were spent promptly it was not a matter of great consequence as to what they were spent for. Members of the mission who openly objected to the uncontrolled nature of the operation were either disciplined or labeled as incompetent. To those familiar with the involved and time-consuming processes for financing public works in the United States, in whole or in part with Federal funds, the cavalier, free-wheeling casual fashion in which huge sums of United States funds were committed in Iran must be shocking.

*Id.* at 4.

38. New York Times, Dec. 15, 1959, at 1, *quoted in* A. SAIKAL, *supra* note 3, at 75.

Amini as Prime Minster.[39] After Amini's appointment, Assistant Secretary of State Phillips Talbot testified:

> In Prime Minster Amini it seems to us there is now a prospect that we can see Iran moving toward a government with a somewhat broader base than it has had and to move toward strengthening its public life . . . It would appear very much in the American national interest to support these [Amini's] objectives and support the present government of Iran to the extent that it can carry out these objectives.[40]

The land reform that began in early 1962 was firmly opposed by religious groups, whose leaders held large religious estates. Directed by the religious leadership and other landlords, public agitation over land reform culminated in mass uprisings in 1963 and the resignation of the Amini government.[41]

The Shah then unveiled his own reform plan, which he called the "White Revolution." It was a "revolution" designed to appeal to, benefit and unify under the monarchy a broad spectrum of Iranian people with vastly different political leanings.[42] This package of reforms, which emphasized land redistribution, workers' profit-sharing in industry, enfranchisement of women, and the formation of a literacy corps was later amended in the 1970's to include price stabilization, a campaign against profiteering, free education and health insurance for the general public.[43] The outcome and motivation for this program sponsored by the United States has been viewed with skepticism as well as admiration. For example, Bill claims that the program represented "the politics of system preservation,"[44] while Ramazani regarded it as "the politics of independence."[45] Alternatively, Zonis has viewed it as "the politics of maneuvering,"[46] while Prigmore has analyzed it in terms of the politics of social modernization.[47]

The United States pressured the Shah for additional reforms during the period 1975 to 1977, and an attempt was made to mollify the "rights-

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39. Kayhan International, Oct. 22, 1977 at 12 and *id.*, Nov. 5, 1977, at 14.
40. Testimony of Phillips Talbott, *Hearings on Act for International Development and International Peace and Security Act of 1961, before the Comm. on Foreign Affairs*, 57th Cong., 1st Sess. at 255 (1961).
41. A. SAIKAL, *supra*, note 3, at 77.
42. M. PAHLAVI, THE WHITE REVOLUTION OF IRAN 2 (1967).
43. R. Ramazani, *Iran's 'White Revolution': A Study in Political Development*, 5 INT'L J. OF MIDDLE EAST STUD. 124–139 (Apr. 1974) [hereinafter cited as RAMAZANI].
44. J. BILL, THE POLITICS OF IRAN: GROUPS, CLASSES, AND MODERNIZATION 133–156 (1972).
45. R. RAMAZANI, *supra* note 43, at 125.
46. M. ZONIS, *supra* note 35, at 74–76.
47. C. PRIGMORE, SOCIAL WORK IN IRAN SINCE THE WHITE REVOLUTION, chs. 3–8 (1976).

conscious" Carter Administration. In early 1977, the Shah extended invitations to the heads of Amnesty International, the International Committee of the Red Cross, and the International Commission of Jurists to visit Iran.[48] In personal audiences, he informed Amnesty International's Martin Ennals and the Commission of Jurists' William Butler that he had put an end to torture and challenged Butler to cite a single instance of torture since the previous September.[49] In October, 1977, the House Subcommittee on International Organizations convened a hearing on the human rights situation in Iran. Called to testify were Butler, Charles Naas, who was the U.S. State Department's Director of Iranian Affairs, and Professor Richard Cottam of the University of Pittsburgh.[50] Professor Cottam noted that the Shah "had responded in ways that are not simply cosmetic. Iran is a country in which the Carter human rights proposals have had a major impact. The Shah is willing to accommodate President Carter's human rights eccentricity."[51] Butler told the Subcommittee that the International Commission of Jurists "was unaware of any cases of torture in Iran in the preceding 10 or 11 months."[52] Naas testified that the American government had received no reports of torture in Iran in 1977, and that political prisoners numbered only 2,200 at the time of the hearing.[53] Two years later, in December 1979, Amnesty International, a usual dissenter to any reports of improved conditions in Iran, admitted that American pressures had had some impact. New York attorney David Emil, who led the last Amnesty Internatonal mission to Iran in late 1978, stated, "It's undoubtedly true that there was a big change between 1976 and the fall of the Shah. It could be characterized as an end of systematic torture."[54] In a similar vein, during negotiations for release of the hostages, a prominent member of the International Commission of Jurists observed candidly: "I think everyone realizes that things got a lot better after 1976, but nobody seems to want to talk about it. I guess it's not fashionable."[55]

C. *The Overthrow and the New Revolutionary Government*. The revolu-

48. De Camera, *The Shah as Tyrant: A Look at the Record*, Washington Post, Mar. 23, 1980, at C1.
49. *Id.*
50. *See Hearings*, *supra* note 35.
51. *Id.* at 5.
52. *Id.* at 12.
53. *Id.* at 27.
54. D. Emil, *quoted in* De Camera, *supra* note 48, at C3.
55. W. J. Butler, *quoted in* De Camera, *supra* note 48, at C3.

tionary forces which eventually overthrew the Shah exploited the contradictions inherent in his pursuit of somewhat conflicting objectives—the dual drive to strengthen the monarchy while simultaneously transforming Iran into a modern, Western-oriented state.[56] In a nation which demanded popular respect for the Shah and his policies, an institutional outlet through which the Iranian people could voice legitimate grievances was lacking.

The presence of SAVAK, or secret police, while more restrained than they had been in the early 1970's, was so pervasive that most Iranians did not trust each other, much less the Government.[57] The Monarchy required political centralization, while conversely the capitalist orientation toward economic development required economic decentralization, public participation and individual initiative.

In the hopes of gaining new support, the Shah made liberal overtures in 1977, but his overextended economic commitments and military expenditures fatally undercut such an effort.[58] The groundwork was laid for a religious regime, equally oppressive, and equally estranged from the populace, especially from the middle class of professionals, technocrats and small businessmen which the Shah had so carefully nurtured.[59] Nevertheless, it was a government with the ability to appeal to interests frustrated by the Shah and a government which served as a rallying point for other factions.[60]

Although the new Iranian Constitution, ratified in December, 1979, provides mechanisms for government,[61] the inability of the Bani-Sadr and Rajai regimes to control events related to the American hostages was a sad corollary to the preceding revolutionary government's unwillingness to prevent the hostages' seizure. American Embassy personnel were seized by armed militants in early November, 1979, but the stage had been set a week earlier by Ayatollah Khomeini's impassioned denunciation of America: "All the problems of the East stem from these foreigners, from the West, and from America at the moment. All our problems come from

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56. *See* A. SAIKAL, *supra* note 3, at 203–208 for a discussion of the factors present during the period 1977–1979 which ultimately led to the Shah's fall from power.
57. *Id.*
58. W. FORBIS, *supra* note 4, at 3–9, describes the last efforts of the Shah to use economic and political initiatives to defuse the burgeoning demand for radical change.
59. *See* De Camera, *supra* note 48, at C3. De Camera details the deplorable record of the Khomeini regime through January 1980. By that date, there had already been 800 known executions without trial, and the total of political prisoners held by the Khomeini Government far exceeded the number held during any part of the Shah's rule.
60. The other political factions are discussed in Section IIC, *infra*.
61. The new Iranian Constitution is fully reproduced in the April, 1980, issue of MIDDLE EAST JOURNAL at 184.

America. All the problems of the Muslims stem from America. . . ."[62] This and similar speeches galvanized the militant factions into action. As one participant in the Embassy takeover rationalized his deeds:

> The need to do something was felt more than ever, which is quite evident in the speeches of the Imam [Ayatollah Khomeini] in the past week or couple of weeks. The Imam during this period has talked to all those received by him about the problem of America. In his last message on the occasion of 4 November he addressed a message to students and all the strata of people, especially pupils, students and theological students, and asked them to extend and strengthen their attacks against the United States. That was why the Muslim student believers in the way of the Imam decided, with regard to all of the above, to take a revolutionary step in the right channel, that is to say against America and its interests. . . . Thus, the need to do something was felt simultaneously in two universities, and students from several faculties agreed on the plan to occupy the Embassy and take the staff of the Embassy hostage.[63]

In May 1980, the International Court of Justice determined that the initial attacks both on the Embassy and on the Consulates at Tabriz and Shiraz could not legally be imputed to the Iranian state,[64] even though Khomeini's inflammatory statements created an atmosphere which invited the abuse. The Court did determine, however, that subsequent govern-

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62. Memorial of the United States on the merits in Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), I.C.J. General List No. 64, at 15 (Memorial presented January 1980) [hereinafter cited as U.S. MEMORIAL].
63. U.S. MEMORIAL, *supra* note 62, Appendix C(6) at 196–97.
64. United States v. Iran, *supra* note 24, para. 61, at 28, wherein the court stated:
> The conclusion just reached by the Court, that the initiation of the attack on the United States Embassy on 4 November 1979, and of the attacks on the Consulates at Tabriz and Shiraz the following day, cannot be considered as in itself imputable to the Iranian State does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations. By a number of provisions of the Vienna Conventions of 1961 and 1963, Iran was placed under the most categorical obligations, as a receiving State, to take appropriate steps to ensure the protection of the United States Embassy and Consulates, their staffs, their archives, their means of communication and the freedom of movement of the members of their staffs.

ment approval of the militants' acts shifted responsibility to the state itself.[65]

One day after the seizure, the Iranian Foreign Minister declared that the "action of the students enjoys the endorsement and support of the government, because America itself is responsible for this incident."[66] The Ayatollah Khomeini, in a decree issued two weeks later, claimed that the American Embassy was "a center of espionage and conspiracy," and that "those people who hatched plots against our Islamic movement in that place do not enjoy international diplomatic respect."[67] He stressed that the Embassy and the hostages would remain as they were until the United States handed over the Shah for trial and returned his property to Iran. The Ayatollah qualified his statement only so far as to request that the militants "hand over the Blacks and the women, if it is proven they did not spy, to the Ministry of Foreign Affairs so that they may immediately be expelled from Iran."[68] As to the rest of the hostages, Khomeini made his Government's position all too clear: "The noble Iranian nation will not give permission for the release of the rest of them. Therefore, the rest of them will be under arrest until the American Government acts according to the wish of the nation."[69] Khomeini wielded nearly unfettered power in Iran and refused to admit that international law applied to the American hostage situation. Efforts to secure the early release of the hostages through diplomacy and

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65. *Id.* para. 74, at 32–33, wherein the court stated:

> The policy thus announced by the Ayatollah Khomeini of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetrate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible. On 6 May 1980, the Minister for Foreign Affairs, Mr. Ghotbzadeh, is reported to have said in a television interview that the occupation of the United States Embassy had been 'done by our nation.' Moreover, in the prevailing circumstances the situation of the hostages was aggravated by the fact that their detention by the militants did not even offer the normal guarantees which might have been afforded by police and security forces subject to the discipline and the control of official superiors.

66. *See* United States v. Iran, *supra* note 24, para. 70, at 31.
67. *Id.* para. 73, at 32.
68. *Id.*
69. *Id.*

recognized principles of international relations proved to be futile.

Many parallels exist between the Shah's leadership in his final year in power and the leadership of the Bani-Sadr/Rajai regime. In both cases, the Government's insecurity vis-a-vis opposing factions led their respective leaders to follow a policy of appeasement rather than risk the opposition of the religious right. The inability of Bani-Sadr to generate support for his presidency among opposition leaders precluded him from challenging the militants and assuming control over the hostages. When in October, 1980, the new Parliament designated Prime Minister Rajai as the individual primarily responsible for the hostage matter, Rajai and his chief negotiator proved no more adept than Bani-Sadr at ending the crisis.

D. *The Seizure of the American Embassy*. The attacks on the United States Embassy in Tehran and the Consulates at Tabriz and Shiraz followed by one week the entrance of the Shah into the United States for medical treatment. On 4 November 1979 approximately 300 demonstrators overran the United States Embassy compound in Tehran.[70] The Islamic Government of Iran normally maintained ten to fifteen uniformed policemen outside the Embassy compound as well as a nearby contingent of "Pasdaran" Revolutionary Guards.[71] On the day of the Embassy attack, however, these security personnel made no effort to deter or discourage the demonstrators from seizing the Embassy premises. According to the *Washington Star*, the security forces simply disappeared from the scene.[72]

The invading militants initially seized not only the lower floor of the chancery but also the security officials who had gone out to attempt to negotiate with them. After more than two hours, these invaders succeeded in gaining entry to the upper floor of the chancery and seized the remaining personnel, with the exception of eleven American staff members who held out in the main vault for one further hour.[73]

Despite repeated calls for help from the Embassy to the Iranian Foreign Ministry, no Iranian security forces were sent to protect the Americans during this three-hour assault.[74] No attempt was made by the Iranian Government to clear the Embassy premises, to rescue the personnel held hostages, or to persuade the invaders and demonstrators to terminate their

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70. Washington Star, Nov. 10, 1979, at A–7, col. 1.
71. U.S. MEMORIAL, *supra* note 62, at 13.
72. Washington Star, Nov. 10, 1979, at A–7, col. 1.
73. U.S. MEMORIAL, *supra* note 62, at 13.
74. *Id.*

action against the Embassy.[75] In fact, one Iranian spokesman, in an interview the following day, stated that Revolutionary Guards had been sent to the Embassy following the appeal for help, but not to secure the release of the hostages and premises from the invaders. According to a Government statement of 5 November 1979:

> [Y]esterday the American Embassy Chargé d'Affaires immediately contacted the Foreign Ministry and stated he lacked security and that he would need protection. So, on orders of the government, the Revolutionary Guards entered to prevent clashes there. Last night the brothers who are occupying the Embassy thanked the guards for their presence and for maintaining security there.[76]

On the same morning that this official statement was made, militant students seized the American Consulates in Tabriz and Shiraz; once again the Iranian Government took no protective action.[77]

The failure of the Government of Iran on 4 and 5 November to protect the American diplomatic premises and its complicity in the attack—from the moment Revolutionary Guards were sent to assist the militants—directly violated the earlier assurances of that Government to the United States.[78]

During an earlier attack on the Embassy in February, 1979, the Govern-

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75. *Id.* at 14.

76. Telephone interview with Sadeq Tabatabai, Nov. 5, 1979 as *reported in* Foreign Broadcast Information Service (FBIS), Daily Report, Nov. 6, 1979, at R14, R16. In an interview published Dec. 1, 1979, in Beirut, Lebanon, the Revolutionary Guards operations commander, asked about the role of the Guards in the occupation of the United States Embassy, replied:

> As a matter of fact, we played no role in the occupation of the Embassy, which was occupied by students supporting Imam Khomeini. The Guards' role was to protect the safety of the hostages and secure the area. There were signs of a serious plot to exploit the situation around the Embassy. Our task was to protect the *safety of both the hostages and the students* (emphasis added).

Interview with Abu Shasrif, undated, AS-SAFIR (Beirut), Dec. 1, 1979, as *reported in* FBIS, Daily Report, Dec. 4, 1979, at 40.

77. Operations at these consular posts had been suspended as a result of the attacks in February, 1979, and no United States personnel were at these posts when the November 5, 1979 attacks occurred. *See* Response by the United States, Dec. 11, 1979, to a question presented by the International Court of Justice on Dec. 10, 1979, *reprinted in* U.S. MEMORIAL, *supra* note 62, at Selected Documents, No. 2.

78. In its Memorial, the United States detailed the assurances given on Nov. 1, 1979, three days prior to the seizure:

> In the early morning of 1 November, in anticipation of a demonstration in the vicinity of the United States Embassy, the Embassy reported to the State Department that the normal complement of police was outside the compound and that the Embassy felt confident that it could get more protection if needed. Thirty minutes later Chargé Laingen reported that several hundred demonstrators were marching back and forth in front of the Embassy, but that the police detachment had been

ment of Iran had acted quickly and efficiently to remove the insurgents.[79] Later, Prime Minister Bazargan sent a letter to the Embassy expressing deep regret for the February incident, indicating Iran's readiness to indemnify the United States for the damage caused to its premises "by anti-revolutionary elements" and conveying assurances that the Government had "made arrangements to prevent the repetition of such incidents."[80] On at least two other occasions prior to the November seizure, Chargé d'Affaires Laingen discussed the security situation with Iranian Foreign Minister Yazdi, who repeated a pledge that Iran would fulfill its international obligation to protect the United States Embassy.[81]

Following the November takeover, 66 captured Americans were subjected to a harrowing ordeal in their various "prisons." At the outset, some were paraded blindfolded with hands bound before hostile and jeering crowds.[82] For much of their captivity the hostages were bound and frequently blindfolded; forced to remain silent for extended periods of time; denied mail; denied the right to communicate with each other; subjected to interrogation; threatened with criminal trials; and threatened with death in the event of an American rescue attempt. Some were also physically abused and threatened directly with weapons.[83] All contact between the hostages and the United States Government, even by telephone, was

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strengthened, providing 'more than enough for now.' The Chief of Police came to the Embassy personally and met with Mr. Laingen, who informed Washington that the Chief was 'taking his job of protecting the Embassy very seriously.' Mr. Laingen reported that the prayer leader at the main demonstration in another location in the city, the Ayatollah Montazeri, had repeated an announcement on the radio that the people should not go to the Embassy. The number of demonstrators at the Embassy varied during the day, up to 5,000 or more, but protection was maintained by Iranian security forces. That evening, as the crowd dispersed, both the Chief and Protocol and the Chief of Police expressed relief to Chargé Laingen that everything had gone well.

U.S. MEMORIAL, *supra* note 62, at 15.

79. President Waldock addressed this and later attacks in para. 14–16, and 64. United States v. Iran, *supra* note 24, at 9–10, 29.
80. *See* response of the United States, Dec. 12, 1979, to a question asked by Judge Gros on Dec. 11, 1979, during oral argument of U.S. request for interim measure. U.S. MEMORIAL, *supra* note 62, at 246.
81. *Id.* at 15 n. 3.
82. McHenry, statement to U.N. on Iran, U.S. DEP'T OF STATE, CUR. POL. NO. 116 (Dec. 1, 1979), at 1.
83. *Id. See also* Washington Post, Jan. 25, 1981, at A21 (former hostage Malcolm Kolp reported being held in solitary confinement for 374 of the 444 days and other physical abuses).

prohibited.[84] American archives and documents were seized and ransacked, with the apparent intent of using them as evidence in the event of hostage trials.[85]

E. *The Iranian Rationale.* In December 1979, and March 1980, the Iranian Government informed the World Court of its official position regarding the hostages. According to Iran's rationale, the seizure of American diplomatic premises and taking of hostages was justified by "more than twenty-five years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of [their] country, and numerous crimes perpetrated against the Iranian people. . . ."[86] This general declaration had been preceded by a series of somewhat inconsistent explanations by individual Iranian officials.

On 12 November 1979, Bani-Sadr justified hostage-taking on the theory that the Embassy was not an Embassy but a center of "government interference in trivial and major affairs and of espionage."[87] Approximately a week later, the Ayatollah Khomeini claimed that diplomats who spy were subject to seizure and that it was the United States which had failed to obey international norms by not extraditing the Shah.[88] One day later, on November 19, Sadeq Ghotbzadeh noted that the law of diplomatic immunity was invalid, claiming "these laws have been made to guarantee [sic] the crimes that the representatives of the big powers have committed in the small countries."[89] In a subsequent interview published in *Stern* on 29 November 1979, Ayatollah Beheshti, Secretary of the Revolutionary Council, offered a more unusual justification for Iranian actions. He admitted that international practice required expulsion, not hostage-taking, when espisonage was discovered. He claimed, however, that this accepted approach was

> not revolutionary. If we are talking here about diplomatic tradition then I would say you are right. But we have a revolution. And they have laws of their own. Being revolutionaries, we support the youth because this action is the only way to make the world familiar with

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84. The only U.S. official to visit the hostages, Representative Hansen of Idaho, did so in a private capacity. Deprivation of contact became even more significant after the unsuccessful rescue attempt in April 1980, when the location of the hostages was changed and attempts to ensure their continued safety became more difficult.
85. Interview with Ahmed Khomeini, Belgrade (Dec. 6, 1979), *reported in* FBIS, Daily Report, Supp. 41, Dec. 17, 1979, at 21–22.
86. Letter from Government of Iran to I.C.J. (Dec. 9, 1979), *quoted in* U.S. v. Iran, *supra* note 24, para. 35, at 18.
87. Message from Foreign Ministry Supervisor Badi-Sadr, Tehran Domestic Service (Nov. 12, 1979), *reported in* FBIS, Daily Report, Nov. 13, 1979, at 37.
88. U.S. MEMORIAL, *supra* note 62, at 215.
89. *Id.*

their ideas, goals and feelings of revenge.[90]

The most candid explanation for the Iranian Government's support for the militants was offered by the Ayatollah Khomeini's grandson, Seyyed Hoseyn, in an interview with *Le Monde* on 26 November 1979. Hoseyn claimed that:

> The occupation of the U.S. Embassy is particularly profitable both in the Third World and in Iran itself. The blows dealt against U.S. imperialism have absorbed all the internal conflicts which were undermining the Islamic Republic, and have united the entire population, regardless of class and political leanings, under the Imam's banner. The Embassy's occupation is the most popular event that has occurred since the monarch was overthrown. It has enabled us to open the door to a strategic alliance between the Islamic movement and the secular and left-wing groups and to a tactical alliance with the Soviet bloc.
>
> The Third World and Muslim peoples, especially the Arabs, now regard the Iranian Revolution as their own. The occupation of the U.S. Embassy has been seen by them as an exciting challenge to the most powerful of the two superpowers. We have therefore liberated these people from fear, from "psychological occupation," which is more effective than any other to which U.S. imperialism subjected them. The seizure of diplomats as hostages is not regarded by Third World populations as a violation of international law about which, moreover, they understand very little. The poor and underprivileged despise the legal and meddlesome minds of the rich and powerful.[91]

William Brannigan, a *Washington Post* reporter assigned to Iran following the revolution, saw Iran's support of the hostage seizure as not merely an attempt to unite the various factions behind Islam but rather as an attempt by militant religious leaders to undermine secular moderate elements within the country and consolidate their own authority.[92] Whatever the justification, there is little question that the Khomeini Government used the hostage crisis to make anti-Americanism a cornerstone of the Islamic revolution.

F. *American Responses.*

1. *Diplomatic Efforts.* In the days immediately following the November 1979 attacks, the United States Government moved quickly and quietly to secure the hostages' release and the clearing of the Embassy

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90. *Id.* at 222.

91. Le Monde, (Nov. 30, 1979), *reported in* FBIS, Daily Report, Dec. 3, 1979, at 19.

92. Brannigan, *U.S. Called Too Eager in Wooing Iran*, Washington Post, June 18, 1980, at A18.

through diplomatic means. Prime Minister Bazargan was immediately contacted and his Government, on 5 November 1979, gave assurances "that the hostages would be released."[93] Then, on 6 November, Bazargan resigned in an apparent protest at the lack of support he was shown by the Revolutionary Council in opposing the militants' actions.

The following day, 7 November 1979, former U.S. Attorney General Ramsey Clark arrived in Turkey enroute to Iran at the head of a Presidential mission. Before the Clark delegation could reach Tehran, the Ayatollah Khomeini forbade any Iranian contact with it.[94] On 12 November, the newly appointed "overseer" at the Iranian Foreign Ministry, Abdol Bani-Sadr, announced that before the hostages could be released, the United States would have to (1) admit that the property and the fortune of the Shah were stolen; (2) promise to refrain from further intervention in Iranian affairs; and (3) extradite the Shah to Iran for trial.[95] Clearly, the Iranian authorities had assumed full responsibility for the seizure of the diplomats and were unwilling to grant their immediate, unconditional release. Four early developments which might have indicated to President Carter that diplomacy alone would not secure the hostages' freedom were (1) Khomeini's support for the terrorism; (2) the collapse of the relatively moderate Bazargan government; (3) the unacceptable conditions announced by Bani-Sadr; and (4) the Ayatollah Khomeini's order forbidding contact with American representatives.[96]

As a result of the unwillingness of the Iranian leadership to accept diplomacy as a route to a solution, President Carter undertook a series of actions to demonstrate that the Iranian actions were legally and morally unacceptable and that the United States was determined to press Iran for an early release of the hostages. American efforts included application for relief at the International Court of Justice, bilateral contacts with other governments, multilateral initiatives at the United Nations, unilateral economic actions, and the advocacy of multilateral economic pressures.

2. *Resort to the United Nations*. The United States requested that the United Nations Security Council consider options for the release of the American hostages and for the restoration of diplomatic premises. This request came in the form of a letter dated 9 November 1979 from the United States Permanent Ambassador at the United Nations to the Security

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93. U.S. Dep't of State reprint of testimony of Peter Constable, Deputy Assistant Sec'y of State for Near Eastern and South Asian Affairs before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, May 8, 1980 at 1.
94. *Id.* at 3.
95. U.S. DEP'T OF STATE, CUR. POL. NO. 179 (May 1980), at 1 [hereinafter CUR. POL. NO. 179].
96. *Id.*

Council.[97] In response, the President of the Security Council, speaking for the Council, appealed on that same day for the release of the hostages.[98] The President of the General Assembly similarly called for the release of the hostages.[99]

On 25 November 1979, Secretary General Kurt Waldheim requested that the United Nations convene to work out a peaceful solution to the crisis.[100] Addressing the Security Council on 29 November, Waldheim declared that the situation in Iran "threatens the peace and stability of the region and could well have very grave consequences for the entire world."[101] On 4 December 1979, the Security Council unanimously adopted Resolution 457, which called upon the Government of Iran "to release immediately the personnel of the Embassy of the United States of America being held in Tehran, to provide them protection and allow them to leave the country."[102] Resolution 457 also requested that the Secretary General lend his good offices to the immediate implementation of the resolution and that he take all appropriate measures to that end.

On 29 December, the United States again requested that the Security Council consider measures to induce Iran to comply with its international obligations. At that meeting, Secretary of State Vance, speaking for the United States, stated that "[t]he United States Government has, with determination, persistence and patience, pursued every peaceful channel available to us."[103] Two days later, the Security Council adopted Resolution 461 which reaffirmed the earlier Resolution 457. This measure deplored Iran's detention of the hostages and once again called for their release.[104] Iran did not comply with the Resolutions, and a Soviet veto blocked the American request for the Security Council to implement sanctions.[105]

3. *Application to the International Court of Justice*. When it became apparent that violations of diplomatic immunity were supported by the ruling Government in Iran and were not mere acts of individual and/or

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97. U.N. Doc. S/13615 (1979).
98. U.N. Doc. S/13616 (1979).
99. U.N. Doc. A/6076 (1979) & A/6096 (1979) (statements by the President of the United Nations General Assembly on Nov. 9 & 20, 1979).
100. Precedent for such a request by the Secretary General under Article 99 was firmly established in 1960 by Secretary General Hammarskjold when he requested a similar Security Council session during the Congo crisis.
101. U.N. Doc. S/PV 2172 (1979).
102. S.C. Res. 457, reproduced in U.S. MEMORIAL, *supra* note 62, Annex 46 at 140.
103. Address of Secretary of State Vance before the United Nations Security Council (Dec. 29, 1979).
104. S.C. Res. 461, reproduced in U.S. MEMORIAL, *supra* note 62, at 27.
105. Thirteen of 15 members of the Security Council voted in favor of the U.S. draft resolution calling for sanctions. East Germany and the Soviet Union voted no.

group terrorism, the United States instituted proceedings against Iran in the International Court of Justice. On that same date, 29 November 1979, a request for interim measures of protection was also filed.[106] Jurisdiction was grounded upon Article 36 of the Statute of the Court,[107] as well as upon a number of treaties to which the United States and Iran are parties and which govern the status, rights and treatment to be accorded diplomatic personnel and premises.[108]

One day later, the President of the International Court of Justice, Sir Humphrey Waldock, in the exercise of the power conferred upon him by the Rules of Court, addressed a telegram to the Governments of Iran and the United States calling attention to the need to act in such a way as would enable any subsequent Order of the Court to have an appropriate effect.[109] Following a hearing on the request for provisional measures,[110] the Court on 15 December 1979, unanimously ruled that Iran should release the American hostages and restore seized premises to exclusive American control.[111]

On 17 December 1979, the Iranian Foreign Minister Ghotbzadeh stated that "[t]he prefabricated verdict of the Court was clear to us in advance; for this reason Iran's Chargé d'Affaires at the Hague was ordered to officially

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106. U.S. DEP'T OF STATE SEL. DOC. NO. 14 (1979), at 5.
107. Because of the "Connally" Reservation taken by the United States regarding subject matter jurisdiction of the I.C.J., if there had been no applicable treaty providing for dispute resolution before the Court, the United States would have undoubtedly suffered the same fate as France in 1956 when France pressed Norway for compensation in the Case of Certain Norwegian Loans 1957 I.C.J. 9, 36, 43, and jurisdiction had been wanting as a result of its "self-judging" reservation.

    Art. 36(1) of the Court's Statute provides that the jurisdiction of the Court encompasses "all matters specifically provided for . . . in treaties and conventions in force." The United States and Iran are, as members of the United Nations, parties to the Statute.
108. *See, e.g.*, the following treaty articles:
    (1) Article XXI, para. 2, of the Treaty of Amity, Economic Relations, and Consular Rights Between the United States and Iran, Aug. 15, 1955, 284 U.N.T.S. 93; (2) Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, accompanying the Vienna Convention on Diplomatic Relations of 1961, 500 U.N.T.S. 95, 241; (3) Article I of the Optional Protocol Concerning the Compulsory Settlement of Disputes, accompanying the Vienna Convention on Consular Relations of 1963, 596 U.N.T.S. 261, 487; (4) Article 13, para. 1, of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, T.I.A.S. No. 8532.
109. This request is reported verbatim in U.S. DEP'T OF STATE, SEL. DOC. NO. 14 (1979), at 5.
110. The arguments made on behalf of the United States by Mr. Civiletti and Mr. Owen for interim measures are reported verbatim in U.S. DEP'T OF STATE, SEL. DOC. NO. 15 (1979), at 2.
111. Order of December 15, 1979, United States v. Iran, Provisional Measures, 1979 I.C.J. 16–17.

reject the decision of The Hague Court."[112]

President Waldock set 15 January 1980 as the deadline for the filing of the American Memorial and 18 February 1980 as the deadline for the Iranian Counter-Memorial.[113] Oral proceedings were scheduled to begin on 19 February 1980, but the United States received a postponement in order to determine first whether any of Secretary Waldheim's initiatives would bear fruit. When those efforts failed, 18 March 1980 was assigned as the date for oral proceedings.[114]

Although the Government of Iran did not participate, the Court carefully addressed the potential objections which Iran might have raised to the Court's subject matter jurisdiction. Similarly, the Court also considered possible substantive defenses which Iran might have raised to the American allegations of abuse. The Court ultimately found, as it had in its Order of 15 December, that this case was not—as Iran had claimed in its letter of 9 December—a matter solely within Iran's domestic jurisdiction. The Court stated that:

> [A]dispute which concerns diplomatic and consular premises and the detention of internationally protected persons, and involves the interpretation or application of multilateral conventions codifying the international law governing diplomatic and consular relations, is one which by its very nature falls within international jurisdiction.[115]

Iran also maintained that the hostage matter was only a "marginal and secondary aspect" of an "overall situation containing much more fundamental and more complex elements [which cannot be examined] divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years."[116] The Court emphasized, as it had in its 15 December ruling that the seizure of a nation's embassy, consulates, and diplomatic personnel could never be

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112. Tehran Domestic Service, Dec. 17, 1979, *reported in* FBIS, Daily Report, Dec. 18, 1979, at 3.
113. United States v. Iran, *supra* note 24, at 3.
114. Iran refused to participate in any manner. It filed no counter-memorial, appointed no agent, and did not participate in the oral proceedings held on 18–20 March 1980. The only communication received by the Court from the Government of Iran were two messages dated Dec. 9, 1979, and March 16, 1980.
115. *See* 1979 I.C.J. 16.
116. Message from Iran to the International Court of Justice (Dec. 9, 1979), *quoted in* United States v. Iran, *supra* note 24, at 18.

considered secondary or marginal to any other alleged violation.[117] The Court's ruling emphasized that the Secretary General of the United Nations had referred to the holding of diplomatic hostages as a "threat to . . . peace." The Court noted that the Security Council, in unanimously passing Resolution 457, had stressed the international community's concern at such action.[118] In ruling against Iran, the Court observed that "no provision of the Statute or Rules of Court contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."[119]

Regarding substantive areas, the Court examined the special circumstances claimed by Iran in defense. The Court found Iran's broad, unspecific allegations of interference in internal affairs unconvincing and emphasized that if Iran had desired to present specific evidence of such claims, it certainly had been presented with the opportunity to do so.[120] More importantly, the Court stressed that even if Iran had been able to establish interference, this would not have been a defense or justification for the seizure of diplomatic personnel.[121] President Waldock also delineated the contribution that the traditions of Islam have made in developing an international norm of diplomatic protection.[122] Judge Tarazi, in his dissenting opinion, concurred with the majority regarding Islamic leadership in this area. Quoting a 1937 lecture of Professor Ahmed Rechid of the Istanbul Law Faculty, Tarazi wrote:

> In Arabia, the person of the ambassador had always been regarded as sacred. Muhammed consecrated this inviolability. Never were ambassadors to Muhammed or to his successors molested. One day, the envoy of a foreign nation, at an audience, granted to him by the Prophet, was so bold as to use insulting language. Muhammed said to him: "If you were not an envoy I would have you put to death."[123]

The Court's majority opinion noted that under customary international law and under the agreements cited earlier—agreements to which the United States and Iran are signatories—diplomatic law has developed its own sanctions designed to be effective without destroying relations be-

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117. United States v. Iran, *supra* note 24, at 18.
118. *Id.*
119. *Id.*
120. *Id.*, at 35.
121. *Id.*, at 36.
122. *Id.*, at 37–38.
123. Dissenting Opinion of Judge Tarazi, United States v. Iran, *supra* note 24, at 55.

tween states.[124] Unfortunately, Iran neither admitted the validity of nor adhered to the International Court's December, 1979, suggestion of interim measures. Nor did Iran recognize the May 1980 decision on the merits.[125]

4. *Economic Measures.* In addition to the unsuccessful efforts at securing the hostages' freedom via diplomacy, the United Nations and the International Court of Justice, the United States took additional measures. On 12 November 1979, the President banned United States purchases of Iranian oil under the Trade Expansion Act.[126] He did so to make clear that the United States would not be blackmailed because of oil requirements.[127] The United States then learned that Iran planned to withdraw its assets from American institutions. The removal of funds would have jeopardized billions of dollars in American claims against those assets—debts owed to both Government and private enterprise.[128] The ripple effect of a mass withdrawal would have threatened disruption of the entire international financial system.

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124. United States v. Iran, *supra* note 24, at 36–38 (discussion of the customary remedies presently available).

125. It is interesting to note that the United States did not petition the Security Council under Article 94 of the United Nations Charter for assistance in implementing the 4 May decision. It may be that the Carter Administration believed that such an effort would be unavailing since the Soviet Union would probably veto such a resolution as it had vetoed the January 13, 1980, draft resolutions calling for economic sanctions against Iran. In case of such a veto, the Carter Administration may have feared that it could not obtain the necessary two-thirds vote in the General Assembly since many Third World countries consider the United States' record in cases of clearly-established threats to peace (e.g., Israeli attacks on Lebanon) to be inconsistent. The Carter Administration elected not to risk being embarrassed in the United Nations by a Security Council veto and lack of support in the General Assembly for a request made under the "Uniting for Peace" rationale. Unfortunately, by not exhausting this possibly remedy to force compliance with the Court's decision, other options may have been precluded.

There is one other possible rationale for not invoking Security Council assistance under Article 94. Since the Security Council, although a political body, would effectively be acting as an appellate court in reviewing and acting on the International Court of Justice's decision, it is quite possible that portions of the decision favorable to the United States might not have been supported by the Council. In that case, certain United States options would have been precluded and a possible United States veto of Security Council action might have become necessary. Since the invocation of Article 94 is discretionary and the Court's decision is effective without further implementation, it could be that the Carter Administration determined it would preserve the greatest number of options by simply impressing the world community with the significance of the 24 May 1980 decision.

126. *President Imposes Oil Ban*, Washington Post, Nov. 13, 1979, at A–1.

127. *Id.* at A–1, A–16.

128. A discussion of these claims can be found in U.S. DEP'T OF STATE CUR. POL. NO. 179, *supra* note 95, at 2.

The President acted quickly to protect the interests of American creditors by blocking the removal of the Iranian funds. In order to do this, the President invoked the provisions of the International Emergency Powers Act of 1977.[129] This Act permits the freezing of foreign assets when there exists "an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States."[130] The Secretary of the Treasury implemented the President's Executive Order on 14 November 1979 with a series of Iranian Assets Control Regulations.[131]

A month later, the United States informed the Iranian Chargé d'Affaires in Washington that personnel assigned to the Iranian Embassy and Consular posts in the United States would be limited to fifteen at the Embassy and five per Consulate.[132] From January to March 1980, the United States exercised restraint in generating additional pressure in order to allow scope for the ill-fated initiatives of Secretary General Waldheim and the work of intermediaries. Factional disputes prevented Bani-Sadr and Iranian authorities from honoring pledges regarding the authority of the United Nations Commission in Iran and in turn stifled Waldheim's diplomatic initiatives.

President Carter then moved to impose unilateral sanctions on Iran, and in April, 1980, all financial dealings and exports to Iran except food and medicine were prohibited.[133] On 17 April, the Carter Administration imposed additional prohibitions on imports, travel and financial transfers related to Iran.[134] This Executive Order also restricted travel to Iran under the Immigration and Nationality Act.[135] Finally, in April, 1980, the United States broke diplomatic relations with Iran and ordered the Iranian Embassy in Washington closed.

While these unilateral measures were being implemented, our allies in Europe, Japan and Canada were imposing economic and diplomatic sanctions against Iran in an effort to maintain a common front. At the

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129. Exec. Order No. 12,170, 3 C.F.R. 457 (1979).
130. International Emergency Economic Powers Act, 50 U.S.C. § 1702 (Supp. III 1979). This law had been enacted in anticipation of emergency situations involving nations not on a war footing with the United States. Preceding legislation, the Foreign Assets Control Regulations, permitted the freezing of assets only of those nations with which the United States was at war. When difficulties with Cuba required similar protection in the late 1950's, the Cuban Assets Control Regulations were enacted. The 1977 Emergency Economic Powers legislation precludes the need for specific legislation each time the interests of American creditors are threatened and allows for implementation of protective measures despite the absence of a declaration of war.
131. CUR. POL. No. 179, *supra* note 95, at 2.
132. *Iran's Embassy Staff Cut*, Washington Post, Dec. 13, 1979, at A-1.
133. Exec. Order No. 12,205, 3 C.F.R. 248 (1980).
134. Exec. Order No. 12,211, 3 C.F.R. 253 (1980).
135. *Id.*

21 April 1980 meeting of the leaders of the European Community, these nine allied nations reaffirmed their support for severe sanctions against Iran and indicated that they would seek legislation enabling them to join the effort at isolating Iran internationally in the event that the hostage conflict had not been resolved by 17 May 1980.[136] When no progress had been made by that date, these allied nations moved to accommodate the United States' request that no new contracts be entered into with Iran and that all contracts negotiated between these nations and Iran after 4 November 1979 be disavowed.[137]

Unfortunately, several European states—Great Britain included—were unable to gain parliamentary support for the entire package of sanctions promised. Thus the impact, while significant, failed to isolate Iran completely from a vital source of imports—Europe. The Soviet Union compounded the problem of incomplete support when it announced that if Iranian ports were blockaded or primary commodities became unavailable from the West, the Soviet Union would neutralize the impact of such measures by providing all necessary assistance. Specifically, the Soviet Union offered its roads and railway system to move goods if Iran's harbors should be blocked.[138] It also promised to supply Iran with primary foodstuffs if these became unavailable from customary sources.[139]

The economic measures adopted by the Western nations, while psychologically satisfying, proved singularly ineffective. In fact, the only noticeable impact was a rallying of Iranians behind Khomeini and the diversion of Iranian attention from internal difficulties to the foreign chal-

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136. CUR. POL. No. 179, *supra* note 95, at 2.

137. Of our allies, Great Britain proved to be the major surprise; Parliament refused to implement Prime Minister Thatcher's proposed sanctions and only agreed to suspend contracting with Iran from the date of the isolation measures. All contracts negotiated between November 4, 1979, and May 17, 1980, remained in effect, including those long-term contracts negotiated in anticipation of possible sanctions. As a result, the impact on Iran and the appearance of solidarity among the Allies were greatly reduced.

Conversely, the United States received unexpected support from Japan and Portugal. Japan, ninety percent dependent on foreign fossil fuels, announced in late May that it would purchase no further Iranian crude at the announced price of $35.00 a barrel, $7.00 more at the time than Saudi Arabian crude. The degree to which this announcement by Japan was based on American efforts to impose sanctions on Iran as opposed to the economics of the situation is difficult to determine.

At the same time, Portugal denounced the Iranian actions and announced an intent to apply all the requested United States measures. This was unexpected since the United States had been recently critical of human rights policies in Portuguese territories.

138. *Russia Supports Iran*, Washington Post, April 15, 1980, at A–1. For a contrary interpretation of the importance of this Soviet announcement, see U.S. DEP'T OF STATE, CUR. POL. No. 165 (April 1980), at 2, wherein President Carter is quoted as discounting the Soviet promise of assistance to Iran. Carter stated that the Soviet transportation routes were insufficient to offset the impact of a blockade or boycott.

139. *Id.* at A–1.

lenge. These measures tended to fragment international support for the United States while making it politically difficult for the Iranians to back down. In short, economic pressures, although perhaps politically expedient as a means to demonstrate Presidential resolution, had the counterproductive effect of unifying Iranian opposition without coercing cooperation.

5. *Humanitarian Intervention*. Concurrently with its judicial, diplomatic, and economic initiatives, in November 1979 the United States began planning a military operation to rescue the hostages. Citing the same legal justification claimed by Israel in rescuing its citizens from terrorists at Entebbe, Uganda, and by West Germany in a similar successful rescue at Mogadishu, Somalia, in 1977,[140] the United States entered Iran during the night of 24 April 1980. A team of approximately 90 American servicemen departed the aircraft carrier *Nimitz* by helicopter for a remote, deserted airstrip in southern Iran, approximately three hundred miles from Tehran. There they rendezvoused with a C-130 transport aircraft for refueling. The plan then called for a flight from this rendezvous point to Tehran.[141] However, when three of the eight RH53 helicopters were disabled by mechanical failures,[142] the mission was aborted and the remaining aircraft departed Iran, but not before a helicopter and transport collided and exploded.[143]

## II. The Central Legal Issues.

The seizure of American diplomatic premises and the kidnapping of diplomatic personnel in November 1979 raises four major legal issues. The first issue is the extent to which the international tradition of diplomatic immunity can be negated by a perceived threat to national sovereignty. Secondly, to what extent did this same perception of American interference jusify Iran's non-compliance with a number of international agreements and conventions to which it was a signatory? Thirdly, to what extent were American diplomatic, economic and military responses to the

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140. *See* Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 Iowa L. Rev. 325 (1967), for the argument that neither customary international law nor Article 51 of the Charter prohibits such acts of intervention. Interestingly, the International Court of Justice largely ignored the American rescue attempt of April, 1980, finding it irrelevant to the determination of whether Iran's conduct in seizing the diplomatic hostages and entering the diplomatic premises violated international law. United States v. Iran, *supra* note 24, at 40–41.

141. *See* U.S. Dep't of State, Cur. Pol. No. 170 (April 1980), at 2–4, for a full explanation of the purpose and plan of the rescue mission, including the thinking that went into the decision to abort.

142. Secretary of Defense Brown later claimed that it had been predetermined that fewer than six RH-53 helicopters would make the mission impossible. *Id.* at 3.

143. *Id.*

crisis permissible under international law? Finally, in a more practical vein, what lessons can be learned from the Iranian hostage crisis which will improve American handling of similar diplomatic confrontations in the future?

A. *The Doctrine of Diplomatic Immunity.* Although history abounds with examples of envoys who suffered mistreatment at the hands of foreign sovereigns, a tradition gradually evolved to refrain from "shooting the messenger" whatever the displeasure at his message or behavior. Over time, this broad custom became formalized in a set of specific rules dealing with the scope of protection to be accorded both the person and property of foreign emissaries. The diplomatic law of present times has its underpinnings in three distinct theories.

The first and oldest doctrine, now partially discredited, involves the notion of "extra-territoriality," which holds that diplomatic premises in a foreign country are a sovereign extension of the diplomat's native land.[144] Similarly, an envoy who represents the "person" of his sovereign is deemed to be outside the territory of the state to which he is accredited, and therefore inaccessible to local authorities.[145] This doctrine has been criticized in recent years because the absolute degree of immunity called for by the fiction of projected sovereignty has never been fully accepted in practice.[146] Nonetheless, the concept has some practical value by demonstrating that envoys must generally be treated as though they are not within the territory of the receiving states.[147]

The representational theory, developed during the Middle Ages, regards the ambassador as a foreign sovereign's personal representative; arrest of an envoy was considered the moral and legal equivalent of apprehending the sovereign. Analogously, any insult to an ambassador constituted affront to the personal dignity of the represented sovereign. The receiving state was obliged to treat an envoy in a manner befitting his representative

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144. *See* 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 774, 775 (1906).

145. B. SEN, A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 80 (1979).

146. E.g., a diplomatic agent is expected to act in conformity with the laws of the receiving state and observe its police regulations even though he cannot be prosecuted for violating them. Also, if he engages in trade or business in his private capacity or owns real property, he is not exempted from local legislation and is required to pay rates and taxes. Regarding the premises of the mission, municipal charges are normally required for beneficial services rendered. Furthermore, crimes committed within the premises of the mission are to be tried in accordance with the laws of the receiving state. The charges leveled against one of the 52 American hostages, a Marine Corps sergeant, for engaging in sexual relations with an Iranian woman, provides an excellent example of conduct not exempted by this doctrine or otherwise arising from representative character or functional necessity.

147. 1 L. OPPENHEIM, INTERNATIONAL LAW 793 (Lauterpacht 8th ed. 1955).

character.[148] In *The Schooner Exchange v. McFadden*,[149] the United States Supreme Court supported this view. The Court, per Chief Justice John Marshall, observed:

> A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for the purpose cannot intend to subject his Minister in any degree to that power; and therefore a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign and to the duties he is bound to perform.[150]

"Finally, the theory of "functional necessity," which has won almost universal acceptance, is the main rationale for the modern granting of diplomatic privileges. This theory holds that a diplomat should be free from interference by local authorities so that he can perform his duties unhindered.[151] If diplomats were liable to ordinary legal and political interference from the state or other individuals—more or less dependent on the good will of the government of the state to which accredited—they could be influenced by considerations of safety and comfort to a degree which would materially hamper them in exercising their duties.

Whatever the theoretical basis for diplomatic privileges and immunities, it is a rule of customary international law that all states are obliged to allow the envoys of other recognized governments independence in the performance of their duties. This implies immunity from jurisdiction in respect to their person, their acts, and the premises of the diplomatic mission.[152] The rule has been considered to be of such importance that one leading authority has stated that "[d]iplomatic envoys are just as sacrosanct as heads of state."[153]

The universal acceptance of the principle is evident from the fact that "from the sixteenth century until the present, one can find virtually no instances where a breach of a diplomat's inviolability was authorized or condoned by the government which received him."[154] In the celebrated de Mathveof case of 1708, in which the Russian Ambassador had been vio-

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148. MANUAL OF PUBLIC INTERNATIONAL LAW 396 (M. Sorenson ed. 1968).
149. 11 U.S. (7 Cranch) 74 (1812).
150. *Id.*
151. MANUAL OF PUBLIC INTERNATIONAL LAW, *supra* note 148, at 396.
152. *See* I.L.C. Commentary on 1958 Draft Article 36, 2 Y.B. INT'L L. COMM'N 101 (1958) [hereinafter I.L.C. Commentary]. The drafters emphasized that the extension of the privileges and immunities enjoyed by the head of a mission to the mission's diplomatic staff was recognized under customary international law.
153. L. OPPENHEIM, *supra* note 147, at 789.
154. SATOW'S GUIDE TO DIPLOMATIC PRACTICE 120 (Lord Gore-Booth 5th ed. 1979) [hereinafter cited as SATOW'S GUIDE].

lently arrested in London,[155] the Queen of England commissioned a Special Ambassador to convey to Peter the Great at a public audience her regret for the treatment suffered by the Ambassador.[156]

The International Court of Justice, in its 15 December 1979 order of provisional measures in the Iranian conflict, stated that obligations assumed by states with regard to the inviolability of diplomatic envoys are "essential, unqualified, and inherent."[157] Likewise, the commentary of the International Law Commission on the comprehensive character of the diplomat's inviolability illustrates the narrowness of the few exceptions which, in its view, could be permitted. Commentary on the 1958 Draft Article 27 underscores this emphasis:

> This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. The principle does not exclude in respect of diplomatic agent either measures of self-defense or, in exceptional circumstances, measures to prevent him from committing crimes or offenses.[158]

The development of rules to protect a diplomat's person is paralleled by the growth of analogous rules protecting diplomatic premises. The inviolability of the diplomatic residence and grounds appears to have become well established by the eighteenth century.[159]

In 1827, a coachman for the United States Minister to London was arrested in the stable of the Legation and charged with assault. When the British Government upheld this action, the American Minister lodged a sharp protest, Britain then assured the United States that, prior to future arrests, the American Head of Mission would be consulted about a mutually acceptable means for executing warrants.[160]

The celebrated Sun Yat-Sen incident in 1896 illustrates the immunity

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155. The Soviets also suffered a violation of diplomatic law during the hostage conflict. On June 26, 1980, Soviet First Secretary Vladimir Golvanov was arrested on a charge of espionage and released from custody shortly thereafter. On June 29, Golvanov was declared *persona non grata* and ordered to leave Iran immediately. *See* Washington Post, July 1, 1980, at A–12, col. 2.
156. SATOW'S GUIDE, *supra* note 154, at 121.
157. Order of December 15, 1979, *supra* note 111, at 19.
158. I.L.C. Commentary, *supra* note 152, at 197.
159. SATOW'S GUIDE, *supra* note 154, at 109.
160. 1. A. MCNAIR, INTERNATIONAL LAW OPINIONS 193 (1956).

enjoyed by a foreign embassy from both judicial process and executive action. When Sun Yat-Sen, at the time a Chinese national and political refugee, was detained as a prisoner within the Chinese Legation in London, apparently for transport to China, a writ of habeas corpus was filed on his behalf. The British court declined jurisdiction, doubting the propriety of such action where a foreign legation was involved, and concluded that the matter was one for "diplomatic" proceedings. The British Government then formally requested the Chinese Ministry to release their captive, whose detention was contrary to law and an abuse of diplomatic privilege. The following day Sun Yat-Sen was freed.[161]

During the 1967 "Cultural Revolution" of the Peoples Republic of China, the British mission in Peking was invaded by "Red Guards" and the Chancery building burned. Although China had not yet signed the United Nations-sponsored Vienna Conventions[162] which affirmed the right of protection for diplomatic and consular premises, Prime Minister Chou En-lai recognized the obligation and enforced a "demonstrate but not penetrate" order. The Prime Minister also announced that the Chinese Government would bear the full cost of rebuilding the mission's premises.[163] Despite a similar atmosphere of revolutionary turmoil, the Iranian Government's response to the hostage conflict was quite different.

B. *International Conventions.* Aside from the general customs of international diplomacy which have accrued over time and become accepted as guidelines for behavior, there are a number of conventions which spell out in detail the rights and privileges of modern diplomats. When the Islamic Republic of Iran refused to protect American diplomatic agents and premises in 1979, the Khomeini Government ignored legal obligations imposed by these diplomatic conventions.[164] Iranian security personnel at the Embassy compound made no effort to deter the November, 1979, attack despite repeated and urgent requests for help. No Iranian security forces were sent to provide relief and protection, nor were any efforts made to rescue the personnel or to dissuade the militants from their actions. During the 15 months that the Americans were held captive, Khomeini made no effort to restore the Embassy's right of free communication, to prevent the looting of American diplomatic premises, or to apprehend and prosecute the perpetrators.[165] Due to a lack of communication with the

161. *Id.* at 85.

162. The Peoples Republic of China acceded in 1975 to the Vienna Conventions of 1961 and 1963. Vienna Convention on Diplomatic Relations of 1961, 500 U.N.T.S. 95; Vienna Convention of Consular Relations of 1963, 596 U.N.T.S. 261.

163. SATOW'S GUIDE, *supra* note 154, at 196.

164. The Islamic Republic of Iran has never officially repudiated these Conventions, despite the comments of Iranians quoted in Section IE, *supra*. This fact was noted by the I.C.J. in its May 24, 1980, decision. *See* United States v. Iran, *supra* note 24, at 23.

165. *Id.*

hostages, the United States was unable to detail all events connected with the seizure of its diplomatic personnel and premises.[166] Even so, the International Court of Justice's May 1980 opinion accepted the American version of events and concluded that the Khomeini Government had failed its legal duties by acts of both omission and commission.[167]

Pursuant to Article 29[168] of the 1961 Vienna Convention on Diplomatic Relations,[169] Iran was legally obliged to treat each American diplomat with "due respect," to take "all appropriate steps to prevent any attack on his person, freedom, or dignity," and to ensure that diplomatic personnel were not subjected to "any form of arrest or detention." Article 37 of this Convention extended these same privileges and immunities members of the administrative and technical staffs as well as to their families.[170] These protections embody "the oldest established and the most fundamental rule of diplomatic law,"[171] a point repeated emphatically by the International Court of Justice in its 15 December 1979 Order discussing provisional measures with respect to the American hostages:

> [t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose; . . . the obligations thus assumed, notably those for assuring the personal safety of diplomats and their freedom from prosecution, are essential,

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166. United States v. Iran, *supra* note 24, at 9.
167. These omissions and actions are addressed in Section ID of the text.
168. Vienna Convention on Diplomatic Relations of 1961, 500 U.N.T.S. 95. Article 29 of the Convention provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."
169. 500 U.N.T.S. 95.
170. *Id.* at Article 37 which, in pertinent part, provides:
    1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.
    2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households, shall, if they are not nationals of, or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29–35, except that the immunity from civil and administrative jurisdiction of the receiving state specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties.
171. E. DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 135 (1976). *See also* Satow's Guide, *supra* note 154, at 120.

unqualified, and inherent in their representative character and their diplomatic function. . . ."[172]

In addition to its obligation to protect diplomatic personnel, Iran also had a duty to bring the attacking militants to justice. Its failure to take either step laid the groundwork for subsequent American claims for reparations.[173]

When Khomeini's regime threatened the hostages with criminal trials, the provisions of Article 31[174] of the 1961 Vienna Convention, which exempts diplomatic personnel from the criminal jurisdiction of a host state and frees them of any obligation to appear as witnesses,[175] also came into play. This general immunity is so engrained as customary international law that, in the view of one leading authority, no case can be cited where,

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172. Order of December 15, 1979, *supra* note 111, at 19.

173. B. SEN, *supra* note 145, at 91. *See also* G. SILVA, DIPLOMACY IN INTERNATIONAL LAW 91 (1972). It is interesting to note that the I.C.J., ruling in the United States' favor with respect to reparations (12-3), indicated that an award could only be fully determined by that Court when the full extent of damages was known. United States v. Iran, *supra* note 24, at 45.

174. Vienna Convention on Diplomatic Relations of 1961, 500 U.N.T.S. 95. Article 31 provides:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
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> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission:
>
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
>
> 2. A diplomatic agent is not obliged to give evidence as a witness.
>
> 3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
>
> 4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

175. Article 37 extends this immunity, with some limited exceptions, to members of the administrative and technical staff of the diplomatic mission as well as to the families of both diplomatic agents and staff. The I.C.J., in its 24 May 1980 decision, did not address the threats of prosecution or threats to compel testimony as violations of the 1961 Vienna Conventions. The Court did state, however, that "if the intention to submit the hostages to any form of criminal trial or investigation were to be put into effect, that would constitute a grave breach by Iran of its obligations under Article 31, para. 1, of the 1961 Vienna Convention." United States v. Iran, *supra* note 24, at 34.

without consent, a diplomatic agent has been tried or punished by local courts.[176]

> History records many cases of diplomatic envoys who conspired against the receiving States, but nevertheless, were not prosecuted. Thus, in 1584, when the Spanish ambassador in England, Mendoza, plotted to depose Queen Elizabeth, he was ordered to leave the country. In 1587, when the French ambassador in England, L'Aubespine, conspired against the life of Queen Elizabeth, he was simply warned not to commit a similar act again. In 1654 when the French ambassador in England, De Bass, conspired against the life of Cromwell, he was ordered to leave the country within twenty-four hours.[177]

The 1961 Vienna Convention also obligates the receiving State to protect the diplomatic premises of the sending state as well as its personnel. On 4 November 1979, according to Article 22 of the Convention, Iran was and continued to be under an obligation to ensure that American diplomatic premises in Iran be held "inviolable" and "immune from search." Article 22 also required Iran to ensure that its agents did not enter the premises "except with the consent of the head of the mission." A "special duty" was placed upon Iran under this Article "to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."[178] Ironically, at the Vienna Conference which approved this Convention, Iran had been particularly vigorous in insisting that the special duty of protection not be qualified in any way, even under exceptional circumstances.[179]

Just as Khomeini's Government failed in its obligation under Article 22 to preserve the inviolability of American diplomatic premises, so too did it fail in its related obligation to ensure the protection of archives and docu-

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176. SATOW'S GUIDE, *supra* note 154, at 124.

177. L. OPPENHEIM, *supra* note 147, at 791.

178. Vienna Convention on Diplomatic Immunities of 1961, 500 U.N.T.S. 95, Article 22 provides:

> 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.
>
> 2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.
>
> 3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

179. Official Records, Vol. I, U.N. Doc. A. Conf. 20/14 at 141–143 (undated).

ments present there, as required by Article 24.[180] By approving the seizure, by ransacking and publishing documents from the United States' mission, and by further threatening their use as "evidence" in judicial proceedings, the Khomeini Government seriously impaired its international standing. By depriving itself of the respect which a state normally enjoys under the doctrine of sovereign equality, the Khomeini Government forfeited an opportunity to gain world sympathy and also reduced its chances of cultivating friends and allies.[181]

Despite Iran's multiple violations of the 1961 and 1963 Vienna Conventions with respect to American diplomatic personnel, the diplomatic staffs of other nations—with the one exception of the arrest of the Soviet First Secretary on 26 June 1980—continued to enjoy the requisite respect and protection.[182] All governments have a shared interest in upholding the rights of their diplomatic representatives, since the relations between states depend on free communication in a myriad of interdependent ways. Iran's adherence to diplomatic law, except in the case of the United States, suggests that the Khomeini regime does not quarrel with this basic notion.

Iran's willingness, in the case of United States personnel, to defy both customary international practice as well as specific legal obligations, underscores the intensity and virulence of its anti-American stance. From Khomeini's perspective, it was American interference since 1953, when the Central Intelligence Agency helped to overthrow Mossadegh and re-

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180. Vienna Convention, *supra* note 178. Article 24 provides: "The archives and documents of the mission shall be inviolable at any time and wherever they may be."

181. Iran also disregarded other requirements of the 1961 Vienna Convention. The I.C.J. noted that Iran had not met its obligations under Article 25 of the 1961 Convention to "accord full facilities for the performance of the functions of the [American] mission"; under Article 26 to "ensure to all members of the mission freedom of movement and travel in its territory"; and under Article 27 "to permit and protect free communication on the part of the mission for all official purposes." Vienna Convention, *supra* note 178.

182. The I.C.J. recognized this and made a point of contrasting the Iranian actions of November 4, 1979 with its conduct on other occasions. The Court stated:

> The total inaction of the Iranian authorities on that date in face of urgent and repeated requests for help contrasts very sharply with its conduct on several other occasions of a similar kind. Some eight months earlier, on 14 February 1979, the United States Embassy in Tehran had itself been subjected to [an] armed attack . . . in the course of which the attackers had taken the Ambassador and his staff prisoner. On that occasion, however, a detachment of Revolutionary Guards, sent by the Government, had arrived promptly, together with a Deputy Prime Minister, and had quickly succeeded in freeing the Ambassador and his staff and restoring the Embassy to him. On 1 March 1979, moreover, the Prime Minister of Iran had sent a letter expressing deep regret at the incident, giving an assurance that appropriate arrangements had been made to prevent any repetition of such incidents, and indicating the willingness of his Government to indemnify the United States for the damage. On 1 November 1979, only three days before the events which gave rise to the present case, the Iranian police intervened quickly and

store the Shah, that had been responsible for delaying a true Islamic revolution for almost thirty years. Accordingly, the metaphor of America as "Satan" embodied Khomeini's notions of an ultimate foe, and the spasm of lawlessness which began on 4 November 1979 is perhaps explainable as a catharsis for three decades of bitterness and frustration.[183]

As in most developing countries, there were few internal constraints—whether from opposition parties, a critical press, or an enlightened public—to pressure Khomeini into upholding the law. In the atmosphere of fervent nationalism which accompanied Khomeini's sweep to power, forces for moderation were depicted as tools of foreign interests. In such an atmosphere, the militant supporters of the clerical leadership fomented domestic pressure to violate other recognized norms as well—in areas such as property ownership, religious freedom, and judicial protection. This combination of revolution and nationalism yielded explosive results—a reordering of both Iranian domestic society and its approach to foreign affairs.

Iran's breach of diplomatic law appears, at first review, to have had a greater impact on developed nations than it did on Iran itself or the rest of the world community. Because Iran is a vendor nation at a time when its export commodity—oil—is coveted by industrialized countries, it can survive economically despite the turbulence and xenophobia of Khomeini's regime.

The clerical leadership probably realizes, however, that an Iranian refusal to normalize relations with the United States may in the long run be counterproductive. In retrospect, the taking of hostages and pillage of diplomatic premises seems to have been an ingenious stroke through which Khomeini tightened his grip on the Government and provided a steady source of emotional fuel for his revolutionary cadre. Now that an Islamic theocracy has become entrenched, the psychological and political value of similar acts of international lawlessness seems to be limited.

C. *Legitimacy of Iranian Claims.* When Iranian authorities announced support for the seizure of American diplomats and diplomatic premises, they were essentially asking the world to accept a rationale of revenge for

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effectively to protect the United States Embassy when a large crowd of demonstrators spent several hours marching up and down outside it. Furthermore, on other occasions in November 1979 and January 1980, invasions or attempted invasions of other foreign embassies in Tehran were frustrated or speedily terminated.

183. After the Shah's return to power in 1953—a return promoted by the CIA—Iran either acceded to or ratified all of the four international agreements upon which the United States relied when it asserted I.C.J. jurisdiction. Although none of these agreements had been repudiated by the Khomeini regime, their non-application with respect to the United States arguably represents thirty years of frustration impossible to translate into a legal context.

purported cumulative abuses suffered at the hands of the United States.[184] They preferred not to offer any legal rationale. Their claim that the seizure was simply a final act of the revolutionary process against a major force of oppression is evidenced by the Government's attempt to retain normal diplomatic relations with other nations during the holding of the hostages.

Professor Richard Falk of Princeton, who finds many plausible points in the Iranian viewpoint, points out that diplomatic custom cannot be viewed in an isolated manner unrelated to other aspects of international law.[185] He argues that the Iranian leadership perceives international law to be skewed and inconsistent: no allowances or exceptions are made for violations of diplomatic immunity, yet the same system of law permits diplomacy which contributes to the deliberate subversion of the government of a foreign state, as they believe occurred in Iran in 1953.[186] Khomeini clearly rejects this bias: "What kind of law is this? It permits the U.S. Government to exploit and colonize peoples all over the world for decades. But it does not allow the extradition of an individual who has staged great massacres. Can you call it law."[187]

Although it appears that Khomeini had no part in planning the Embassy seizure and was not even consulted by those who did, he recognized immediately that by supporting their coup he could offer something to please the masses while at the same time strengthening his own position. Khomeini aligned himself with popular fervor and stated that his policy would be to "go where the crowds go."[188] A similar tactic appears to have been adopted by Bani-Sadr, although with much less success. After first exhorting the militants to stop trying to be a government within a government, he too attempted to ride the tiger of mob enthusiasm.

The third force within the government after the revolution were the

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184. See section IB of the text.
185. Falk, *The Iran Hostage Crisis: Easy Answers to Hard Questions*, 74 AM. J. INT'L L. 411 (1980).
186. *Id.* at 413.
187. Interview with Ayatollah Khomeini, TIME, Jan. 7, 1980, at 27.
188. *Id.* Political observer Joseph Kraft, however, seriously questioned this hypothesis. He argued that since Khomeini went both unchallenged and uncriticized in ordering the release of hostage Richard Queen when it appeared Queen had an illness which the Iranians could not effectively treat, there actually had been a government with which to deal. Kraft urged that the lack of movement toward a negotiated settlement was merely an indication of the ineptness of the Carter Administration. *See* Washington Post, July 15, 1980, at A-15. The difficulty with this argument is that the inability to treat Queen's illness and his possible death were seen as a liability by all factions—Khomeini, Bani-Sadr, the clergy and the militants. By releasing Queen, the Iranians gained both the opportunity to push their claim that the hostages were only representatives of the real villain, the United States, and the opportunity to show that their hostage-holding was conditioned on principle, not common criminality.

"mullahs,"[189] the same religious authorities who rose to power within the Iranian Parliament in October 1980. Amir Taheri, former editor in chief of Iran's largest newspaper *Kayhan*, claimed at an early date that the United States' best hope for a resolution of the crisis and the freeing of the hostages rested with the Islamic clergy.[190] "They could succeed where Bani-Sadr has failed. And they could propose a settlement with Washington without being suspected by Khomeini of 'succumbing to the idol.' "[191] Taheri claims that most responsible mullahs see the Soviet Union as the natural sponsor of the totalitarian left and see the United States as the only real counter-balancing force. While it is true that many moderate members of the clergy did condemn the initial seizure of diplomats, did support the United States in condemning the Soviet invasion of Afghanistan, and did veto a foreign ministry decision that Iran should attend the Moscow Olympics,[192] in all other respects they have failed dismally as a counterbalance to Khomeini's policies. In fact, after the crisis had been resolved in January 1981, it became apparent that the religious intolerance enforced by this segment of Iranian society—the clergy—would prevent a representative or democratic government from developing in Iran.

Although Khomeini maintained his personal grip on Iran throughout the hostage crisis, it took him considerable time to throttle rival power centers such as the military, the leftists, and the moderates led by Bani-Sadr. Khomeini's intransigence and inscrutability, combined with the lack of an effective central government, greatly complicated American efforts to resolve the hostage situation. Curiously, this combination of disorganization and fanaticism put Iran in a powerful bargaining position. America's power and global influence provided scant leverage. Economic pressures had little bite due to Iran's oil wealth; diplomatic maneuvering and world opinion paled before Khomeini's Islamic fundamentalism; and use of American military force, except in the limited context of humanitarian rescue, promised to be more risky than helpful to the United States' long-term international interests. The Iranian rulers apparently recognized what American officials had learned during the *Pueblo* incident—namely that in some situations American power is both too potent and too constrained to be wielded against relatively underdeveloped countries

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189. The most powerful mullahs during the crisis were the late Ayatollah Mohammed Beheshti, Hashemi Rafsanjani, and Khomeini's heir-apparent Ayatollah Hossein-Ali Montazeri, who presently serves as *de facto* party boss of the Islamic Republican Party. With the ability to control the position of prime minister, the mullahs were able to maintain a direct hold on the Iranian Government.
190. Taheri, *The Need to Cultivate Iran's Clergy*, Washington Post, Apr. 27, 1980, at F-4.
191. *Id.*
192. *Id.*

willing to commit acts of international lawlessness. Khomeini's regime gambled, correctly, that American policy and concern for the hostages as individuals would lead to a negotiated settlement rather than devastating repercussions for Iran.

According to one eminent scholar of diplomacy, the only legitimate goal of an act of international coercion is preservation of the status quo.[193] At the first glance, the seizure of American hostages in Iran seems to have been more an act of revolution than a defense of the status quo. Yet, from Khomeini's viewpoint, perhaps recalling the influence exerted by American agents during a similar crisis in 1953, it may have seemed necessary to preserve the "status quo" of his fledging theocracy by doing what he could to paralyze American ability to interfere in Iranian affairs. Mossedegh's mistakes would not be repeated. Thus, the sacking of the Embassy and seizure of hostages proved to be a useful *fait accompli*. At one stroke Khomeini eliminated the nerve center of United States activities in Iran; captured a wealth of documents detailing American involvement, both prior and current; and, by holding captives, provided himself an insurance policy against drastic counter-moves. In short, Khomeini opted to seize the high ground by acting first, then arguing. Among other concessions, Khomeini was able to wring from President Carter an agreement to allow appointment of a United Nations Commissions of Inquiry to examine Iranian grievances against the United States. For Khomeini, these grievances spanned a period of thirty years; and to focus only on the events of 1979-80, as the United States urged, would be to examine the fruits of the crisis while ignoring its roots.

D. *Legitimacy of American Responses.* International coercion can assume many forms. In addition to the use or threat of military force, coercion can also appear as economic or other nonviolent pressure if it has the effect of altering significant national interests. Coercion in its many guises is a fact of international relations. Under the current norms of international law, coercion is impermissible when unreasonable, and reasonableness is a function of both the necessity and proportionality of specific measures in a given context.[194]

Following seizure of its personnel and premises in Iran, the United States responded with a spectrum of political, economic and military

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193. M. McDougal & F. Feliciano, Law and Minimum World Public Order: The Legal Regulation of International Coercion 222 (1961).

194. Proposals at the 1951 drafting conference for the unratified Draft Code of Offenses Against the Peace and Security of Mankind included several items concerning ideological and economic coercion. See McDougal & Feliciano, *supra* note 193, at 190–96. The Bolivian draft used terminology which incorporated secondary methods of aggression/coercion—methods which would have applied to Articles 2(4) and 51 of the United Nations Charter:

pressures. Were these responses, in light of Iranian behavior and existing rules of international law, justifiable as "reasonable" attempts at coercion?

The United States is bound, as are all members of the United Nations, to "maintain international peace and security."[195] When that minimum world order of the international status quo is breached, all nations are affected.[196] If a country's security interests are directly threatened by that breach, then Article 51 of the United Nations Charter comes into play. Article 51 provides a limited right of self-defense against an "armed attack": "Nothing in the present Charter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security."

Did the seizure of American diplomatic representatives, although no soil of the United States was invaded and no large military units were attacked, trigger this self-defense provision of Article 51? According to one analyst, action cannot be justified under Article 51 unless the force directed against the "political independence" of another state has as its purpose the "permanent subjugation of that state to domination."[197] This interpretation envisions a broad-based and far-reaching attack, but arguably an attack against just a portion of a nation's governmental or military apparatus is legally analogous to an attack against the whole. If diplomatic representatives are held captive in an attempt to induce a nation to change its policy or to abandon its rights, the political independence of that country has clearly been subjected to attack.

The final clause of Article 2(4) of the United Nations Charter, which forbids the threat or use of force "in any other manner inconsistent with the Purposes of the United Nations," supports this interpretation. The primary purpose of the United Nations is to "bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."[198] The seizure of diplomatic hostages and the invasion of diplomatic premises are uses of force in "a manner

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> Unilateral action whereby a state is deprived of economic resources derived from the proper conduct of international trade or its basic economy is endangered so that its security is affected and it is unable to act in its own defense or to cooperate in the collective of peace shall likewise be deemed to constitute an act of aggression.

McDougal & Feliciano, *supra* note 193, at 195.

195. U.N. CHARTER art. 1, para. 1.

196. McDougal, *The Soviet Cuban Quarantine and Self Defense*, 57 AM. J. INT'L L. 588, 598 (1963).

197. Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 556 (1963).

198. U.N. CHARTER, art. 1, para. 1.

inconsistent" with this primary purpose and thus triggered Article 51. Article 2(4), which is a general prohibition on the use of force, and Article 51, which carves out an exception to that prohibition, must be read together in a way that will give them both reasonable meaning. As one authority puts it:

> Article 2(4) refers to both the threat and use of force and commits the Members to refrain from "threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purpose of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion.[199]

Equally vital to a viable system of world order is the concept of community response.[200] Group reaction is preferred, but in situations where a community response is either unavailable or too slow, unilateral response by the attacked nation may be necessary and legitimate.[201] Following the Iranian hostage seizure, the United States made every effort to mobilize the world community via the United Nations. The United States urgently addressed the President of the Security Council on 9 November 1979 requesting assistance in obtaining release of the hostages. The Security Council responded by unanimously adopting Resolution 457, which called upon Iran to free the hostages and clear the Embassy premises immediately. When the Iranian Government ignored this resolution, the Security Council unanimously affirmed its earlier action with Resolution 461. This second call was also ignored. On 13 January 1980, in an effort to convince Iran that its best interests would be served by immediate compliance with community norms, the United States proposed enforcement

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199. McDougal, *supra* note 196, at 598.

200. The concept of a minimum world order system as defined by Professors McDougal and Lasswell of the Yale Law School would include the prohibition against the illegal use of international coercion by states as defined in Article 2(4) of the U. N. Charter, tempered by the strictly limited exception codified in Article 51.

    The optimum world order system would include the higher legal and humanitarian values codified within Articles 1, 2, 55, and 56 of the U.N. Charter. For a discussion of interests significant to such a comprehensive system of world order, see McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

201. MacChesney, *Some Comments on the Quarantine of Cuba*, 57 AM. J. INT'L L. 588, 595 (1963).

measures in the Security Council. Although the draft resolution easily received a two-thirds majority within the Security Council, the Soviet veto effectively ended any chance for the United Nations to back its words with actions and be more than an impotent onlooker to the unfolding of the crisis.[202]

Concurrently, the United States filed an action in the International Court of Justice. Both the interim measures endorsed in December, 1979, and the later decision on the merits were repudiated by Iran. These avenues having been exhausted, the United States then instituted a number of economic sanctions intended to be coercive.[203] The focus of American response shifted from words to deeds.

E. *American Objectives.* The United States seemed unable to determine what objectives it wished to pursue and also reluctant to admit that economic sanctions seldom prove successful against a post-revolutionary regime.[204] An editorial in the British *Manchester Guardian Weekly* asked: "But where is the strategy? Is the release of the hostages all we are trying to achieve or are we concerned also with the future stability of Iran and the region?"[205] Although public attention was focused on the fate of the hostages, more significant—although less dramatic—goals seemed to be the preservation of American influence and reputation as a supporter of world order.[206] If release of the hostages had been the United States' only goal, the Shah could have been seized and used as a bargaining chip. America's problem lay in translating its multiple policy interests into clear, convincing terms—credible to our allies and clearly discernible to the Iranians. The difficulty was exacerbated by the Carter Administration's inability to separate the various crises demanding responses. The situations in Iran and Afghanistan seemed to merge into one in the President's mind, whereas effective conflict management required that they be kept on related, but separate, tracks.

In the case of Iran, President Carter's inability to decide on a course of action made it difficult for America's European allies to be certain just

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202. There has been speculation that the Soviet Union vetoed the January 13, 1980, draft resolution in the Security Council in retaliation for U.S. sponsorship of the earlier General Assembly resolution condemning the Soviet invasion of Afghanistan. The General Assembly resolution was passed under the "Uniting for Peace" rationale (G.A. Res. 377 V. U.N. Doc. A/1775 (1950) ) following a Soviet veto in the Security Council.
203. See Section IF4 of the text.
204. The economic sanctions imposed against post-revolutionary regimes in the Soviet Union, China and Cuba were a total failure. Similarly, League of Nations' sanctions against Mussolini's Italy and United Nations' sanctions against Rhodesia, far from punishing those countries, actually led to greater unity, harder work, and years of increased productivity.
205. Manchester Guardian Weekly, May 13, 1980, at 14.
206. Fisher, *Sanctions Won't Work*, NEWSWEEK, Jan. 14, 1980, at 21.

where it was the United States was headed. For five months after the hostage seizure, President Carter seemed ready to rely on a medley of political, judicial, and economic initiatives in the belief that rational leadership in Iran would eventually prevail on the student militants. When, on 24 April 1980, he abandoned this policy without consulting any allies, he was stunned to find questioning amazement among friends abroad. Months earlier Carter had committed a similar political gaffe by imposing a series of unilateral sanctions against both Iran and the Soviet Union without first adequately preparing the Western alliance. These turns and twists of policy, often adopted after only minimal consultation with allies, suggest that President Carter did not believe that he could successfully mobilize a community response.

In part, this vacillation between unilateral and group initiatives echoes the dual nature of the hostage crisis as both an American and a global problem. Although the situation affected the United States most acutely, all signatories of the 1961 and 1963 Vienna Conventions had a direct interest in the safe return of diplomatic hostages and premises.

The attempt at forcible rescue in April 1980, if successful, would have solved the American part of the problem without resolving the larger issues of diplomatic rights and international order. The unsuccessful rescue operation followed an Administration posture towards Iran which had first been severe, then lenient, then harsh once again. While the Carter Administration could argue persuasively that these changes were justified in light of the constantly changing situation, the frequent reversals mystified Europeans. Had our allies followed President Carter's initial call for strong measures, noted one European ambassador, the allies would have been caught short by the change to leniency. "We would have been out on a limb and he could have sawed it off. That's why we're a little wary now of being told we have to be tough."[207]

As former Under Secretary of State George Ball urged, the European allies did have an important, although narrower, interest in the Iranian crisis, and "[w]e should [have] welcome[d] their counsel and not resent[ed] it."[208] He stated further that the United States should have listened carefully to the urging of its allies for a unified effort to isolate Iran politically so that the community of states could show the Iranian people "that the government which violates the sanctity of an embassy becomes an international pariah."[209]

Although the various American responses were basically justified, their timing and methodology do not appear to have been optimal. The failure of the United States to secure early release of the hostages was in part a

207. Time, April 28, 1980, at 15.
208. Time, May 12, 1980, at 29.
209. *Id.*

function of President Carter's inability to devise and execute a coherent strategy and, more importantly, a result of the world community's understandable unwillingness to give his actions the respect and credibility needed to impress the Iranians.

F. *American Crisis Diplomacy in the Future*. In theory, a government's response to unlawful coercion is governed by principles of international law applied to the context of a particular situation. A government should be prepared to meet unexpected and intolerable situations with legal contingency plans which are suited for quick response, whether the responses be political and/or military. Responses based on legal analysis rather than on political expedience would, in the Iranian situation, likely have promoted an earlier end to the crisis and a less traumatic restoration of world order.

The Iranian seizure of the American Embassy was unlawful both in terms of diplomatic law and in terms of general principles governing the legitimate use of force. The American retaliation to Iran's violations, however, raises troubling questions. Not only was the overall pattern of responses tactically ineffective, it seemed at times as though American attempts to secure release of the hostages were in collision with broader goals of the international community.

On one hand, diplomatic efforts of the United States to mobilize community action through the Security Council and through the International Court of Justice were measures which tended to reflect and preserve community values. Conversely, America's unilateral economic and military steps, especially when taken without prior consultation or consent, undercut the preservation of community values. In limited circumstaces, such as the need for self-defense against aggression, unilateral responses are permitted. The distinction between permissible self-defense and impermissible self-help, however, is often blurry. Solid arguments can be mustered on both sides regarding the issue of the "reasonableness" of American attempts to coerce Iran into releasing the hostages.

Certain implications of the 444-day Iranian hostage crisis are clear. The continued vitality of mutual world values depends on much more than a search for national catharsis. The American public's penchant for gestures, such as candlelight vigils and yellow ribbons, was matched by the Carter Administration's tendency to confuse symbol with substance and to palm off poses in the name of policy. Politically, the crisis put Carter in a tight spot. The American public demanded a solution to the problem, yet paradoxically this surge of public pressure to "do something" reduced the President's ability to hang tough. Time was perceived as being on the side of the Iranians. In retrospect, it seems that the predicament controlled Carter rather than vice-versa. His willingness to tack back and forth in dealing with the crisis met the public demand for visible action and also provided moments of cathartic relief. In the long run, however, this at-

tempt to reconcile Iranian intransigence with the American appetite for action resulted in a settlement favorable to Iran. A country that confuses catharsis with defense of its interests is a nation uncertain of its values, and President Carter's effort to ride both horses at once proved to be counterproductive.

President Reagan now finds himself bound by the terms of the Carter Administration's negotiated settlement, terms which the U.S. Supreme Court has generally upheld as legal even if not wise.[210] Some of the terms, such as the requirement to return unencumbered Iranian financial assets, do no more than honor a pre-existing obligation. Other commitments which pertain directly to the official relationship between Iran and the United States, such as the formation of a joint American-Iranian Claims Tribunal, should also be honored as a positive contribution to community values.

Some parts of the agreement, however, may be legally unenforceable. One such provision is the requirement that

> The United States will order all persons within U.S. jurisdiction to report to the U.S. Treasury, within 30 days, for transmission to Iran, all information known to them, as of Nov. 3 1979 . . . with respect to the property and assets of the former shah. Violation of the requirement will be subject to civil and criminal penalties described by U.S. law.[211]

No such order has ever been issued, and it is highly improbable that President Reagan will ever do so; if he did, enforcement would be impossible.

President Reagan's pledge of "swift and effective retribution" in case of threats to Americans abroad is clearly meant to deter future attacks as well as to reassure a concerned nation. Given the profusion of incidents throughout the world, there seems to be little chance that Reagan's warnings will turn back the tide of disorder. In fact, the probability of direct engagement by the United States could spur some groups to risk more radical outcomes than they would have attempted previously.

Hopefully, the painful lessons of the Iranian hostage conflict have spurred the current Administration to review the entire range of alternatives available for protecting limited—but highly visible—national interests such as American diplomatic personnel and property. The mere pledge of quick retribution is not enough.

A heightened sensitivity and alertness to the possibility of terrorism—a current phenomenon in less-developed nations—would go far in preparing the United States for the unexpected while at the same time promoting the

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210. Dames & Moore v. Regan, 453 U.S. 654 (1981).
211. Washington Star, Jan. 29, 1981, at A-12, col. 3.

design of responsive contingency plans. To this end, the United States ought to ensure that its military and/or political responses—responses that should support customary international law while also being firm—reflect America's weight and standing in the international community.

## Chronology

*1979*

Jan. 16 Shah Mohammad Reza Pahlavi leaves Iran for "an extended vacation."

Feb. 1 Ayatollah Ruhollah Khomeini returns to Iran after 15 years in exile.

Oct. 22 The deposed Shah arrives in New York from Mexico for medical treatment.

Nov. 4 Marchers storm the U.S. Embassy in Tehran, take 100 hostages, including 63 Americans, and demand that the U.S. extradite the Shah.

Nov. 6 The Government of Prime Minister Mehdi Bazargan resigns. Khomeini turns power over to the Revolutionary Council.

Nov. 8 Abdol Hassan Bani-Sadr is appointed Foreign Minister of Iran.

Nov. 9 The U.N. Security Council appeals for the immediate release of the hostages.

Nov. 12 President Carter announces a halt to U.S. oil imports from Iran. Iran announces suspension of oil sales to the United States.

Nov. 14 Iran announces it will withdraw its financial reserves from American banks. President Carter responds by freezing Iranian assets in the United States.

Nov. 18 Two black Marines and a woman hostage are released.

Nov. 19 Ten more hostages—four women and six blacks—are released.

Nov. 20 President Carter orders a naval task force into the Indian Ocean.

Nov. 28 Bani-Sadr is dismissed as Foreign Minister and replaced by Sedegh Ghotbzadeh.

Nov. 29 Mexico announces it will not renew the Shah's tourist visa.

Dec. 2 The Shah is flown from New York to an Air Force hospital near San Antonio. President Carter calls the move temporary, for the Shah's "recuperation." Libyans march on the U.S. Embassy in Tripoli and set it on fire.

Dec. 4 The U.N. Security Council approves a resolution calling for the release of the hostages. The Iranian militants refuse to recognize the Security Council.

Dec. 10 The State Department reiterates that the United States will discuss "differences" with Iran only after the hostages are freed. Marine Cpl. William Gallegos appears in a televised interview from the Embassy.

Dec. 15 The Shah leaves the United States for Panama. The Revolutionary Council continues to hold the United States responsible for alleged crimes committed under the Shah. Iranian militants declare that the hostages will be tried "as soon as possible." The International Court of Justice rules in favor of the United States and orders the release of the hostages. The militants reject the decision.

Dec. 18 Ghotbzadeh calls on the United States to launch an inquiry into the regime of the Shah.

Dec. 19 U.N. Secretary General Kurt Waldheim asks the United States to delay its appeal to the Security Council for economic sanctions against Iran because of "intensive discussion" with the Iranians. President Carter agrees.

Dec. 25 Three U.S. clergymen and an Algerian archbishop conduct Christmas services for the Americans.

Dec. 31 Waldheim leaves for Iran to negotiate for the hostages' release.

*1980*

Jan. 4 Waldheim, denied a meeting with Khomeini, returns to New York and predicts "no quick solution" to the crisis.

Jan. 13 The U.N. Security Council vote on U.S.-proposed sanctions against Iran is vetoed by the Soviets.

Jan. 22 President Carter tells Congress in his State of the Union address that the United States will have "no basic quarrel with Iran" once the hostages are freed.

Jan. 27 Bani-Sadr wins Iran's presidential election with 75 percent of the vote.

Jan. 29 Six U.S. diplomats hiding in Tehran are smuggled out of Iran with Canadian passports.

Feb. 8 Ghotbzadeh says Iran's Government will use force if necessary to gain control over the militants.

Feb. 12 Bani-Sadr says that extradition of the Shah is no longer a condition for the release of the hostages.

Feb. 13 President Carter speaks of "positive signs" for a negotiated solution, and endorses an international commission of inquiry. Bani-Sadr announces that Khomeini has approved a plan for release of the hostages.

Feb. 14 Bani-Sadr says the hostages could be released within 48 hours if President Carter accepts Iran's plan, which would put the hostages in the care of a third party while a commission investigates Iran's grievances.

Feb. 16 Bani-Sadr, modifying the timetable, says that after the United States accepts Iran's conditions, "preparations will be made for negotiations" to release the hostages. President Carter says the United States regrets "any misunderstanding" it had with Iran and looks forward to resuming normal relations.

Feb. 17 Waldheim completes formation of a five-member U.N. Commission to investigate Iran's grievances against the Shah. The U.S. approves the Commission after "specific understandings" are reached on its purpose and method.

Feb. 18 Iran approves the Commission, but a Revolutionary Council spokesman says the U.N. panel is not necessarily related to the release of the hostages.

Feb. 23 The Commission arrives in Tehran. Khomeini says the hostages' fate will be determined by the Parliament to be elected in April.

Mar. 6 The militants announce plans to release the hostages to the Revolutionary Council. They still refuse the U.N. Commissioners a visit with the hostages. The U.S. press returns to Iran.

Mar. 7 Ghotbzadeh says the hostage transfer will occur March 8.

Mar. 8 The militants say Ghotbzadeh lied about Khomeini's approval of the transfer. Khomeini remains silent.

Mar. 9 Ghotbzadeh says the militants have 24 hours to give up the Americans or allow the U.N. commission to visit them—or the Revolutionary Council will "take over the hostages."

Mar. 10 The Administration accuses Iran of failing to keep its promise to allow the U.N. panel to see the hostages.

Mar. 11 The U.N. Commission leaves Tehran, admitting failure. The United States maintains that peaceful efforts to resolve the crisis have not been exhausted. The Shah is reported seriously ill with an enlarged spleen.

Mar. 21 Administration officials say the United States does not want the Shah to return to this country unless doctors certify there is no other way to save his life.

Mar. 23 The Shah leaves for Cairo, 24 hours before the Iranian Government requests his extradition from Panama.

Mar. 25 The United States sends messages to its allies calling for new sanctions against Iran unless the hostages are transferred to the control of the Government by March 31. A Carter message to Bani-Sadr sets March 31 as deadline for the hostage transfer.

Mar. 27 The Revolutionary Council postpones the second round of parliamentary elections. Secretary of State Cyrus Vance agrees to a proposal by the Senate Foreign Relations Committee to issue a "white paper" on U.S. relations with Shah's regime.

Mar. 28 The Shah undergoes surgery by an American medical team. The Administration announces plans to intensify economic and political pressure on Iran.

Mar. 29 Iran makes public the purported text of a conciliatory message from President Carter to Khomeini. The White House denies that anyone in the Government sent the message.

Mar. 30 The United States acknowledges that it sent two written messages to Iran through the Swiss Government.

Mar. 31 President Carter gives Iranian leaders until April 1 to transfer the hostages to the control of the Revolutionary Council or face tougher sanctions.

Apr. 1 President Carter delays any sanctions. Amid conflicting statements from Iran, Bani-Sadr says the Revolutionary Council will take control of the hostages if the United States refrains from "any propaganda . . . or provocation" against Iran until the future parliament decides the hostages' fate.

Apr. 2 President Carter promises the United States will refrain from threats and hostile statements toward Iran so long as there is progress on release of the hostages.

Apr. 3 Bani-Sadr affirms his Government will take control of the hostages April 5. The Revolutionary Council fails to agree on their transfer, saying President Carter's response does not meet Bani-Sadr's conditions.

Apr. 6 Three U.S. clergymen celebrate Easter with the hostages.

Apr. 7 Khomeini says the hostages must remain with the militants until Iran's future Parliament decides their fate. The United States breaks diplomatic relations and imposes new economic and political pressures on Iran.

Apr. 8 Iranian diplomats leave the United States. Khomeini hails the diplomatic break as a "good omen." Washington asks its allies to follow the U.S. lead with strong economic and political measures against Iran.

Apr. 9 An Iranian telecast reportedly shows two hostages explaining "espionage" equipment at the embassy. The militants threaten to "destroy" the hostages if the U.S.—or its "puppet," Iraq—takes any military action against Iran.

Apr. 10 European nations decline President Carter's appeal for new political and economic sanctions, issuing a new condemnation of Iran instead.

Apr. 12 Western ambassadors meet with Bani-Sadr to press for release of the hostages. President Carter says he specified to allies a date (mid-May) by which they should break diplomatic ties with Iran if economic and political measures fail. For the first time, President Carter speaks openly of using military force to end the crisis.

Apr. 13 Ten U.S. allies says they will withdraw diplomatic missions from Iran temporarily.

Apr. 17 President Carter announces new economic reprisals against Iran and says "the only next step available that I can see would be some form of military action."

Apr. 18 President Carter says he has received reports that Khomeini wants to keep the hostages until after the U.S. presidential election in November. Khomeini's office denies this report.

Apr. 22 European ministers agree to limited political and economic sanctions against Iran.

Apr. 25 The White House announces that a mission to rescue the hostages has been aborted because of "equipment failure." Eight Americans are killed when a helicopter and a cargo plane collide on the ground in Iran.

Apr. 26 The militants announce that the hostages will be moved to various Iranian cities and that they will be killed if there is another rescue attempt.

Apr. 28 Secretary of State Vance resigns (his resignation was submitted on April 21 to protest the rescue mission).

May 8 Edmund Muskie is sworn in as Secretary of State.

May 10 Results of the second stage of parliamentary elections held May 9 give the Islamic Republican Party a majority.

May 24 The World Court of International Justice rules on U.S. appeal, unanimously ordering Iran to release the hostages. The Court also criticizes the rescue attempt. Syrian diplomat Adib Dawaudi arrives in Tehran to complete the report of the U.N.-sponsored Commission.

May 28 Iran's new Parliament convenes.

May 31 A delegation of 10 Americans, including Ramsey Clark, defies a presidential ban on travel to Iran to attend a three-day conference on "U.S. Involvement in Iran."

Jul. 11 U.S. consular officer Richard Queen, held hostage for 250 days, is freed for medical reasons.

Jul. 20 The Iranian Parliament holds its first regular session. There is no discussion of the hostages.

Jul. 22 Exiled Iranian diplomat Ali Akbar Tabatabai is assassinated at his home in Maryland.

Jul. 27 The Shah dies in Cairo. Pro- and anti-Khomeini demonstrators clash with Washington, D.C., police.

Aug. 1 Charges against the demonstrators are dropped and the Iranians are turned over to immigration officials.

Aug. 4 Bani-Sadr admits the ill effects of the economic sanctions against Iran.

Aug. 5 Immigration officials order the Iranians released.

Aug. 15 The White House denies published report that it is planning an October invasion of Iran.

Sep. 12 Khomeini sets four conditions for release of the hostages: return of the Shah's wealth, cancellation of financial claims against Iran, guarantees of no U.S. interference in Iran's affairs, and the freeing of frozen Iranian assets.

Sep. 13 Presidential candidate Ronald Reagan says the U.S. should unfreeze Iranian assets, cancel all claims against Iran and agree not to intervene in Iranian affairs as part of agreement for immediate release of hostages.

Oct. 2 Iran's Parliament selects seven members for special committee to recommend a solution to the hostage crisis.

Oct. 16 Iran's new Prime Minister, Mohammad Ali Rajai, appears before U.N. Security Council, but says he is not here to discuss the hostages and refuses to meet with any U.S. official.

Oct. 20 President Carter says that if hostages are released, the U.S. will release frozen Iranian assets here, end economic sanctions and seek normal relations with Iran.

Oct. 23 Speaker of Iran's Parliament says Iran might not require immediate U.S. compliance with the conditions, but might accept a pledge to work toward their fulfillment.

Oct. 26 Iran's parliament begins debate on hostage issue.

Oct. 30 Islamic hard-liners block parliamentary debate on hostages.

Nov. 2 Iran's Parliament formally sets conditions for hostages' release.

Nov. 3 The militants agree to turn the hostages over to the Government. Iran announces that Algeria will serve as its intermediary in negotiations with the United States.

Nov. 4 Iranians demonstrate at U.S. Embassy on first anniversary of takeover.

Nov. 10 Deputy Secretary of State Warren Christopher arrives in Algeria with formal U.S. response to Iran's conditions.

Nov. 20 Top-ranking U.S. and Iranian officials announce that the U.S. has accepted "in principle" the four Iranian conditions. However, financial aspects present legal difficulties.

Nov. 25 Algerian diplomats arrive in the U.S. to negotiate for Iran.

Nov. 27 Militants announce they have handed the hostages over to the Government.

Dec. 1 Christopher returns to Algeria for talks.

Dec. 19 Iran sends the U.S. revisions of the four conditions, and demands $24 billion before hostages can be freed.

Dec. 22 Iranian officials again threaten to put the hostages on trial, after Muskie calls their conditions "unreasonable."

Dec. 26 Two Algerian diplomats meet with all 52 hostages and report they appear in "good health."

Dec. 30 Algerians get a reformulated version of U.S. proposals.

*1981*

Jan. 1 Carter administration sets Jan. 16 deadline for settling hostage issue during its tenure.

Jan. 4 Three hostages are moved from Foreign Ministry.

Jan. 7 Christopher flies to Algeria to clarify technical questions on handling of frozen Iranian assets.

Jan. 14 Parliament authorizes the Iranian Government to arbitrate with the United States on the hostage release.

Jan. 15 Iran offers new procedures for handling the frozen assets.

Jan. 16 Negotiations enter the final stages.

Jan. 19 An agreement is announced, but is blocked by a last-minute hitch.

Jan. 20 Final agreement reached. Hostages board plane for freedom.

# Bluejacket Diplomacy: A Juridical Examination of the Use of Naval Forces in Support of United States Foreign Policy

*Commander Dennis R. Neutze, JAGC, USN**

***Over the years, the United States Navy has evolved into a potent diplomatic weapon. In this article, Commander Neutze examines the lawfulness of the political uses of naval power in terms of domestic and international law. This examination includes a discussion of naval missions and their relation to foreign policy objectives, constitutional and legislative provisions giving birth to the Navy, and the constitutional allocation of power regarding foreign policy and the use of force. The article then focuses on current legislative restrictions on the use of force, including the War Powers Act. Finally, Commander Neutze discusses the evolving Law of the Sea regime and its potential impact on the use of naval forces for political purposes.***

A study by the Brookings Institution found that the United States employed its armed forces 215 times for political purposes between 1946 and 1975.[1] Naval forces participated in 80% of these instances, and more than 100 incidents involved only naval forces. If the period surveyed were narrowed to include only political uses since 1955, the Navy was involved in nine of every ten incidents.[2] These figures clearly support President Warren G. Harding's assessment that "the Navy is rather more than a mere instrumentality of warfare. It is the right arm of the State Department

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*Commander Neutze is the Legal Advisor to the Deputy Chief of Naval Operations (Plans, Policy and Operations) and Assistant Branch Head, Oceans Policy Branch, Politico-Military Policy and Current Plans Division, Office of the Chief of Naval Operations; B.S., United States Naval Academy, 1965; J.D., University of Maryland, 1970; M.A. (International Relations), Boston University, 1974; and LL.M. (International Law), George Washington University, 1979. Commander Neutze is a graduate of the Armed Forces Staff College and admitted to practice before the Bars of Maryland, the District of Columbia, the United States Court of Military Appeals and the Supreme Court of the United States.

1. B. BLECHMAN & S. KAPLAN, FORCE WITHOUT WAR: U.S. ARMED FORCES AS A POLITICAL INSTRUMENT 23 (1978) [hereinafter cited as BLECHMAN & KAPLAN]
2. *Id.* at 38–39.

. . . ."[3] The Brookings' figures also support an assertion made by the Commander in Chief of the Soviet Navy, Admiral Sergey Gorshkov, that the Navy is our "pet instrument of foreign policy."[4]

The political, or foreign policy, uses of naval forces include a broad spectrum of both nonbelligerent and belligerent use of naval forces. The list spans the innocuous transport of a former Turkish ambassador's remains on board the U.S.S. *Missouri* in 1945, intended to serve a subtle reminder to the Soviet Union of American support for Turkey,[5] to the actual use of weapons in the rescue of the crew of the *Mayaguez*, perhaps intended as a reminder of American resolve in the wake of Vietnam.[6]

Every president since World War II has used naval force as an instrument of his foreign policy. For example, one newspaper article reported:

> Prime Minister Menachem Begin and Israel's top military and political leaders were given a splashy demonstration today of U.S. sea and air power that clearly was intended to underpin Israeli confidence in the American government's commitment to guarantee Middle East peace. Although U.S. officials persistently denied any political motive to the day-long cruise in the Mediterranean [aboard U.S.S. *Eisenhower*] and the noisy display of firepower, the message of Ameri-

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3. Speech before the Press Club of Seattle (Jul. 27, 1923), *reprinted in* DEPARTMENT OF THE NAVY, AMERICAN NAVAL POLICY AS OUTLINED IN MESSAGES OF THE PRESIDENTS OF THE UNITED STATES FROM 1790 TO 1924 AT 30, 31 (1924).
4. Gorshkov, *Navies As A Weapon of the Aggressive Policy of Imperialist States in Peacetime* in 12 MORSKOY SBORNIK (1972), *reprinted in* 100 NAVAL INST. PROC. 56, 61 (No. 9, Oct. 1974). The United States, however, was clearly not the innovator of the use of naval forces for foreign policy purposes. One historian noted that during the nineteenth century the "British Navy was the main implement of British foreign policy." F. HEARNSHAW, SEAPOWER AND EMPIRE 196 (1940). In its coverage of a fairly recent crisis in the Persian Gulf, the Washington Post observed that the British still regard naval force as an ingredient of foreign policy and reported that "Britain's Royal Navy . . . diverted three frigates and sent them into the Mediterranean as a political signal to back up Britain's condemnation of the Soviet invasion of Afghanistan." Washington Post, Feb. 11, 1980, at A21, col. 1.
5. Press release, March 6, 1946, 14 DEP'T STATE BULL. 447 (1946). Referring to the port visit, the American Ambassador telegrammed: "Translated into specific terms involving Turkey, foregoing means to Turks that U.S. has now decided that its own interests in this area require it to oppose any effort by USSR to destroy Turk independence and integrity." Telegram from the American Ambassador in Turkey to the Secretary of State (Apr. 12, 1946) *reprinted in* VII FOREIGN RELATIONS OF THE UNITED STATES 822 (1946).
6. Referring to the *Mayaguez* seizure, then Secretary of State Henry Kissinger remarked: "The impact ought to be to make clear that there are limits beyond which the United States cannot be pushed. . . ." N.Y. Times, May 17, 1975, § 1 at 1, col. 8. For a factual description of the event, see Paust, *The Seizure and Recovery of the Mayaguez*, 85 YALE L. J. 774 (1976). *Compare* the reported statement *with* Friedlander, *The Mayaguez in Retrospect: Humanitarian Intervention or Showing the Flag?*, 22 ST. LOUIS U. L. J. 601 (1978).

can military might was not lost on the 750 officials and guests aboard this massive nuclear-powered aircraft carrier of the Sixth Fleet.[7]

The widespread use of naval forces as an instrument of foreign policy began long before the end of World War II, and such use raises important legal issues related to the proper role of the Navy, the constitutional and statutory allocation of power between the President and Congress, and legitimacy under international law. Despite the growth of relevant literature[8] and the increasing opportunities for further use of naval forces to implement U.S. foreign policy,[9] the juridical consequences of such use have not been fully explored.[10] (Although primary focus will be on the use of the U.S. Navy for foreign policy purposes, the term "naval forces" herein includes participation by Marine Corps units since the U.S. Marine Corps is part of the Department of the Navy.)[11]

## I. Naval Missions And Their Relation To Foreign Policy Objectives.

The United States Navy is charged with four missions:

- Control of the Sea;
- Projection of Power Ashore;
- Strategic Deterrence; and
- Naval Presence.[12]

The first mission, "sea control," is that role historically associated with

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7. Washington Post, May 11, 1979, at A25, col. 4.
8. *See generally* Blechman & Kaplan, *supra* note 1; E. Luttwak, The Political Uses of Seapower (1974); J. Cable, Gunboat Diplomacy: Political Applications of Limited Naval Force (1971).
9. On January 27, 1976, Secretary of Defense Donald H. Rumsfeld advised Congress that: "Uncertainties concerning our future access to allied bases may cause us to place increasing reliance on seabased forces in many contingencies." U.S. Dep't of Defense, Report of the Secretary of Defense to Congress on the FY 1977 Budget 121 (1976); *see also* B. Desmukes, Expected Demand for the Navy to Serve as an Instrument of U.S. Foreign Policy: Thinking about Political and Military Environmental Factors 29 (1980); J. Cable, *supra* note 8, at 127.
10. *See generally* D. O'Connell, The Influence of Law on Sea Power (1975). Professor O'Connell was a British Professor of International Law, and a Commander, Royal Navy Reserve. His work does not, of course, address issues of American municipal law.
11. 10 U.S.C. § 5011 (1976).
12. Chief of Naval Operations, Strategic Concepts for the U.S. Navy, NWP 1, para. 3.2 (Rev. A, 1978). The revision does not explicitly list naval presence as a mission of the U.S. Navy. However, an examination of NWP 1 (Rev. A), especially para. 3.4, reveals that naval presence continues to play a substantial role in naval force requirements. Moreover, while testifying on the FY 1981 military posture and the naval budget, the Chief of Naval Operations noted that "every U.S. administration since the end of World War II has found naval forces an invaluable and irreplaceable aid in support of foreign policy." *Hearings on Military Posture and Department of Defense Authorization for Appropriations for Fiscal Year 1981*, 96th Cong., 2d Sess., Pt.1, 542 (1980).

navies and still considered the fundamental function of the U.S. Navy.[13] It involves keeping open sea lanes of communication for U.S. and allied purposes while denying their use to the enemy. Although this mission may assume a political dimension, sea control is for the most part a wartime mission. A notable exception is the 1962 naval quarantine of Cuba during which sea control forces enforced the Monroe Doctrine.[14] Due to its limited application to peacetime uses of force, however, the subject of sea control receives little attention herein.

"Projection of power ashore" describes the attainment of military objectives on land by the use of Marine Corps amphibious forces.[15] Although this mission is also largely war-related, the frequent peacetime use of Marine Corps forces to support foreign policy broadens its political dimension.[16] As one of the more coercive and potent forms of naval diplomacy, amphibious operations seem to have become a recognized use of naval force in support of peacetime foreign policy objectives. Although this article pays little direct attention to the above naval missions, one should not ignore their *sub rosa* contribution to the use of naval forces for foreign policy purposes.

The fundamental use of naval forces for foreign policy purposes lies in the psychological impact that such forces generate in a target state.[17] Thus, unless the force poses a credible threat, its attempted political use will have little effect.[18] Consequently, the perceptions of the Navy's ability to control the sea and project power ashore bear directly on the political utility of naval forces.

The third mission of the Navy, "strategic deterrence," involves the use of naval forces—principally ballistic missile submarines—to discourage adversaries from launching a nuclear attack. Although such forces play an important role in the nation's strategic defense triad (together with the

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13. *See* Department of Defense Directive 5100.1 (1958), Functions of the Department of Defense and Its Major Components 9. According to Admiral William J. Crowe, "sea control is the Navy's preeminent function because it is a prerequisite for the successful conduct of other types of naval operations. . . ." Crowe, *Western Strategy and Naval Missions Approaching the Twenty-First Century*, in PROBLEMS OF SEA POWER AS WE APPROACH THE TWENTY FIRST CENTURY 14, 21 (J. George ed. 1978).
14. For a legal analysis of that operation, see Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Under International Law*, 31 GEO. WASH. L. REV. 335 (1962).
15. Projection of power ashore can also involve the use of airpower from aircraft carriers.
16. *See generally* Parks, *Foreign Policy and the Marine Corps*, 102 NAVAL INST. PROC. 18 (No. 11, Nov. 1976).
17. E. LUTTWAK, *supra* note 8, at 6.
18. BLECHMAN & KAPLAN, *supra* note 1, at 110. The authors found that positive outcomes—the fulfillment of two-thirds of U.S. operational objectives—occurred with greater frequency when U.S. Armed Forces had previously been used in a region. The authors

land-based missile and manned bomber), their political utility at levels less than nuclear confrontation are doubtful. A submarine operating in its normal mode lacks the coercive psychological impact of a surface combatant.[19] However, even the ballistic missile submarine may occasionally be called upon to perform a political task peculiarly suited to its mission. For example, the U.S.S. *Patrick Henry* visited Izmir, Turkey, in 1963 to reaffirm Turkey's inclusion in the scope of American nuclear protection after removal of land-based ICBMs following the Cuban Missile Crisis.[20] Generally, however, the covert nature of submarine operations limits their utility for political purposes.

It is with the fourth naval mission—naval presence—that this article is primarily concerned. The term "naval presence" simply means the use of naval forces short of war to achieve political objectives.[21] The broad aims of naval presence are to encourage actions in the best interests of the United States or her allies,[22] and to deter actions inimical to those interests by projecting a stabilizing influence into an area of crisis.[23]

Although all armed forces function, to some extent, as an arm of foreign policy, there are several advantages to sea power.[24] Its principal advantage is flexibility. Since naval forces operate in an international medium—the high seas—they can be moved into an area without the necessity of obtaining overflight or diplomatic clearances.[25] Another classical advantage of sea power is its "universality" or "pervasiveness," meaning that the sea permits naval vessels to reach distant countries independent of nearby bases.[26] Moreover, sea-based forces are not subject to host-country employment restrictions, a problem encountered by United States land-based forces during the 1973 Middle East conflict. Further, the use of ground troops generally signifies strong resolve and a long-term commitment that

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concluded that demonstrated willingness to engage in a major conflict in a region prior to an incident caused leaders in the target state to be more sensitive to signals of U.S. resolve to become involved militarily, if necessary.

19. D. O'CONNELL, *supra* note 10, at 181.
20. Reported in E. LUTTWAK, *supra* note 8, at 2 n.2.
21. Turner, *Missions of the U.S. Navy*, 26 NAVAL WAR C. REV. 14 (No. 5, Mar–Apr 1974). Admiral Turner served as President of the U.S. Naval War College at the time he authored his article. Thereafter, throughout the Carter Administration, he served as Director of the Central Intelligence Agency.
22. *Id.* at 14.
23. *See* NWP 1 (Rev. A), *supra* note 12, at para. 3.4.2.
24. *See* R. O'CONNOR, FORCE & DIPLOMACY 2 (1972).
25. NWP 1 (Rev. A), *supra* note 12, at para. 3.4.3.2.
26. Bull, *Sea Power and Political Influence*, in 1 INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, POWER AT SEA 6 (1976).

tends to escalate rather than de-escalate a conflict.[27] The decision to use ground forces almost always results in a violation of the territorial integrity of another nation, whereas naval forces can remain outside but near territorial waters for long periods, thereby allowing for much greater flexibility in terms of a final decision to commit the forces. Finally, naval forces enjoy an important operational advantage since a significant part of the Navy's support is organic to the combat unit, thus simplifying communications and logistics.[28] Taken together, these features have made naval forces, in the words of former Chief of Naval Operations Elmo Zumwalt, the "relevant factor" in almost all crises that have occurred since World War II.[29]

The table below illustrates the emphasis national decisionmakers place on naval forces compared to other forces when armed forces are used for political or foreign policy reasons.

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27. McGruther, *The Role of Perception in Naval Diplomacy*, 28 NAVAL WAR C. REV. 3 (No. 2, Sept–Oct 1974).
28. BLECHMAN & KAPLAN, *supra* note 1, at 40. *See* J. CABLE, *supra* note 8, at 49 in which the author describes the use of armies and air forces for political purposes as "cumbrous instruments dragging a long tail behind their teeth."
29. E. ZUMWALT, ON WATCH 344 (1976). Some would argue, however, that in the years since Admiral Zumwalt wrote his book naval forces have become less important as a political instrument in crisis situations. The Airborne Warning and Control System (AWACS) aircraft has now become a powerful weapon in the President's political arsenal. A recent Washington Post article reported an Air Force officer as stating "Ten years ago . . . the president would have sent in the Marines. Today, it's AWACS." The article went on to report:

> The last two presidents—the first to have AWACS at their disposal—have deployed the planes like latter-day gunboats to show the world American power, interest and commitment.
>
> –To Saudi Arabia in March, 1979, when neighboring North and South Yemen were shooting at each other and Iran was in turmoil.
>
> –To South Korea in October, 1979, after South Korean President Park Chung Hee was assassinated.
>
> –To Egypt in September, 1981, after Egyptian President Anwar Sadat was murdered by his soldiers.
>
> –To other distant trouble spots—on secret missions.

Washington Post, Jan. 3, 1982, at A16, col. 1.

*Activities of Naval and Other U.S. Armed Forces For Political Objectives, 1946–75* [30]

| Type of Activity | *Number of Incidents* | |
|---|---|---|
| | Naval forces | Other forces alone |
| Providing an American presence | 68 | 1 |
| Visit | 44 | 0 |
| Patrol/reconnaissance/surveillance | 35 | 9 |
| Exercise/demonstration | 29 | 1 |
| Movement of military equipment or forces to a target | 22 | 8 |
| Movement of a target's military forces or equipment | 13 | 8 |
| Evacuation | 18 | 1 |
| Use of firepower | 14 | 4 |
| Emplacing ground forces or occupying territory | 10 | 8 |
| Interposition | 6 | 1 |
| Escort of a target's force | 5 | 2 |
| Demonstrating transit rights | 4 | 3 |
| Blockade | 3 | 0 |
| Other | 4 | 0 |

The foreign policy or political use of naval power differs from other applications of military power in that its use is continuous.[31] Routine naval activities, or "preventive deployments," contribute in several ways to the overall American foreign policy goal of conflict avoidance. First, preventive deployments demonstrate the United States' military and political commitment to particular states or groups of states. The continuous presence of the Sixth Fleet in the Mediterranean is an example. Preventive deployments also demonstrate to foreign governments the capability of U.S. naval forces to act, if required, in support of our interests. And, naval presence forces confirm, on a routine basis, our political commitments to others.[32] Finally, both joint exercises and port visits indicate favorable political relations between two nations.[33]

A second type of deployment supporting foreign policy is the "reactive deployment" in response to a crisis. Such deployments may simply signal

30. BLECHMAN & KAPLAN, *supra* note 1, at 54.
31. Luttwak, *The Political Applications of Naval Force*, 26 NAVAL WAR C. REV. 38 (1973).
32. McNulty, *Naval Presence—The Misunderstood Mission*, 28 NAVAL WAR C. REV. 21, 26 (1974).
33. *Id.*

American interest in the outcome of the crisis; alternatively, the presence of naval forces on scene may be intended to induce a preferred course of action. In some cases, such as the 1958 crisis involving the islands of Quemoy and Matsu, naval forces may be interposed between an opponent and his objective to prevent him from achieving his goal.[31] Or, the presence of naval forces in the ports of a client state may deter an attack on the client.[35] In each of these cases, naval forces have been employed to exert pressure or influence an outcome without resort to force. Although such a strategy is largely dictated by our world order system, which prohibits the use of force,[36] it is also a sound military policy. As the great strategist Sun Tzu wrote thousands of years ago, "The supreme act of war is to subdue the enemy without fighting."[37]

The line of demarcation between coercive and noncoercive uses of "naval presence" is difficult to pinpoint. It is against this background that the remainder of this article should be read. Although, in the actual course of events, the nonbelligerent and noncoercive uses of force for political purposes predominate, greater emphasis will be placed herein on coercive uses of force since they pose the more difficult legal problems.

## II. The U.S. Navy In Historical Context.

A. *The Framer's Intent.* From the beginning, American colonists had substantial maritime interests. It was only natural that the United States should one day become a great naval power.[38] However, the creation of a powerful navy, or indeed any navy, was not contemporaneous with the birth of the Nation. Although the Articles of Confederation authorized the United States "to build and equip a navy,"[39] there was no Navy in being after the close of the Revolutionary War.[40] It has been suggested that the problems and weaknesses of the Articles of Confederation might have been more easily dealt with had the Confederation possessed an

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34. Walter, *Interposition: The Strategy and Its Uses*, 22 Naval War C. Rev. 72 (No. 10, June 1970).
35. Soviet naval presence in Port Said and Alexandria is considered to have deterred Israeli attacks against those ports. Theberge, *Soviet Naval Presence in the Caribbean Sea Area*, in J. George, *supra* note 13, at 181, 182.
36. A dicussion of the world order system is contained *infra* at text accompanying notes 308 through 361.
37. Sun Tzu, The Art of War vii (1944).
38. 1 E. Maclay, History of the Navy 3–13 (1898).
39. Articles of Confederation, art. 6, in 9 Journals of the Continental Congress (1777).
40. C. Paullin, The Navy of the American Revolution 244–51 (1906).

effective naval force.[41] Whatever may have been the merits of such a view, it does not seem to have been a thought foremost in the minds of the Framers of the Constitution.

The records of the Constitutional Convention are practically silent with regard to the Navy. The draft Constitution, which was reported out of the Committee of Detail to the full Convention, provided Congress with the authority "[t]o build and equip fleets."[42] With no recorded debate, this language was amended to the present wording of the Constitution "[t]o provide and maintain a Navy"[43] as "a more convenient definition of the power."[44] These words represent the sum of the naval power discussion; having authorized the creation of a navy, the Framers did not specify how it was to be used. This lack of attention is in marked contrast to the Framers' preoccupation with the merits or evils of standing armies and the regulation of the militia.[45] The total lack of controversy in the Convention regarding naval power is explainable because its need was so apparent. As Madison later remarked, "The palpable necessity of the power to provide and maintain a navy has protected that part of the Constitution against a spirit of censure which has spared few other parts."[46]

The public debate surrounding ratification reveals in some detail the mood of the time toward naval power. Alexander Hamilton, a staunch supporter of the draft Constitution, viewed its objectives as "the common defense of the members; the preservation of the public peace, as well as against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of

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41. H. SPROUT & M. SPROUT, THE RISE OF AMERICAN NAVAL POWER, 1776–1918, at 16–17 (1944); *see also* Ramsay, *An Address to the Freemen of South Carolina on the Subject of the Federal Constitution* in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 378–79 (P. Ford ed. 1888):

> Let us also compare the present confederation with the proposed constitution. The former can neither protect us at home, nor gain us respect abroad. . . . Without money, without a navy, or the means of even supporting an army of our own citizens in the field, we lie at the mercy of every invader; our sea-port towns may be laid under contribution, and our country ravaged.

42. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 182 (M. Farrand ed. 1911) [hereinafter cited as "____ RECORDS"].
43. U.S. CONST. art. I, § 8, cl. 13.
44. II RECORDS, *supra* note 42, at 330.
45. E.g., I Records, *supra* note 42, at 465; II Records, *supra* note 42, at 329–30 (standing army); *id.* at 380–88 (militia).
46. THE FEDERALIST NO. 41, at 254 (H. Lodge ed. 1888) [hereinafter cited as "THE FEDERALIST NO. ____"].

our intercourse, political and commercial, with foreign countries."[47] With these goals in mind, Hamilton later noted: "If we mean to be a commercial people, or even to be secure on our Atlantic side, we must endeavor, as soon as possible, to have a Navy."[48]

In the state ratifying conventions, those supporting the naval power generally emphasized its role in the Confederation's self-defense. In the South Carolina Convention, Rawlins Lowdes noted that "[i]t was urged, that until we had a navy powerful enough to protect us, our liberties and property were held only on a courtesy . . . ."[49] As Edmund Randolph of Virginia argued, "[w]e must have a navy, to be supported in time of peace as well as war, to guard our coasts and depend on against invasion."[50]

Hamilton, who appears to have been the leading advocate of naval power, also placed heavy emphasis on the necessity of naval protection to extend maritime commerce . . . ."[51] In Hamilton's view, in the absence of a navy "our commerce would be a prey to the wanton intermeddlings of all nations at war with each other. . . ."[52] Hamilton's concern was shared by John Marshall. Speaking of the European powers, the future Chief Justice observed: "[T]he sea makes them neighbors to us. Though an immense ocean divides us, we may speedily see them with us. What dangers may we not apprehend to our commerce? Does not our naval weakness invite an attack on our commerce?"[53]

So strong were Hamilton's views regarding the need for naval protection of American commerce that he advanced the creation of a navy as a justification for the very federal government which the Constitution sought to create. "To this great national object, a NAVY, union will contribute in various ways."[54] If an effective national government were not created, the protection of commerce would be left to state navies "which would only embrace the resources of a single part."[55] "Leave America divided into . . . independent governments," argued Hamilton, and "what fleets could they ever hope to have?"[56]

The far-sighted Hamilton advanced still another justification for the Navy not suggested by its other supporters. Hamilton saw the creation of

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47. THE FEDERALIST NO. 23, *supra* note 46, at 136.
48. THE FEDERALIST NO. 24, *supra* note 46, at 146.
49. THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliott ed. 1836) [hereinafter cited as "_____ DEBATES"].
50. 2 DEBATES, *supra* note 49, at 84.
51. THE FEDERALIST NO. 11, *supra* note 46, at 65.
52. THE FEDERALIST NO. 11, *supra* note 46, at 63.
53. 2 DEBATES, *supra* note 49, at 189
54. *Id.* at 65.
55. *Id.* A two-ship Navy had been approved for Virginia in 1783. M. SMELSER, THE CONGRESS FOUNDS THE NAVY, 1787–1798, at 12 (1959).
56. THE FEDERALIST NO. 4, *supra* note 46, at 20.

an American Navy as a counterweight to affect the balance of power among European interests in America. "By a steady adherence to the Union, we may hope, erelong, to become the arbiter of Europe in America, and to be able to incline the balance of European competitions in this part of the world as our interest may direct."[57] Of all the Navy's supporters, only Hamilton articulated the need for a Navy capable of serving as an instrument of foreign policy.

To be sure, the desire to empower Congress with the right to create a Navy was not unanimous. James Monroe, for one, felt the danger from Europe to be more imagined than real.[58] Others viewed the Navy as an instrument for the exploitation of southern states by northern states.[59] Patrick Henry voiced concern that the Navy would become a tool of imperial ambition[60] and also cause a heavy financial burden.[61]

Collectively, the Framers' statements and the history of the Constitutional Convention suggest that several factors were taken into consideration in the decision to empower Congress to create a Navy. Defense against external aggression and protection of commerce predominate among the various considerations. The use of naval forces to further the political aims of the Republic or to influence world affairs was also considered. The role—probably of secondary importance—that such use played in the decision is, uncertain. What is certain, however, is that there is nothing to indicate that the Framers did not intend the Navy to be so used.

B. *Early Legislation.* Ratification of the Constitution and the birth of the Federal Government did not result in the immediate creation of a U.S. Navy. The power granted to Congress was discretionary. The permissiveness of the power to create a navy had earlier been pointed out during the Virginia Convention by Nicholas Wilson in urging ratification: "They are not bound to do it in five or ten years, or at any particular time. It is presumable therefore they will postpone it until it be proper."[62]

Almost no attention was paid to naval policy during Washington's first

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57. THE FEDERALIST NO. 11, *supra* note 46, at 62.
58. 3 DEBATES,*supra* note 49, at 212–213.
59. William Grayson of Virginia contended: "All the vessels of the intended fleet, would be built and equipped in the northern states, where they have every necessary advantage and convenience for that purpose. . . . The consequence will be that the southern states will be in the power of the northern states." 2 DEBATES, *supra* note 49, at 319. A similar argument was made in South Carolina by Rawlins Lowdes. 3 DEBATES, *supra* note 49, at 375.
60. *See* 3 DEBATES, *supra* note 49, at 53.
61. *Id.* at 157.
62. 3 DEBATES, *supra* note 49, at 430.

term.[63] Naval affairs were assigned to the Department of War with the proviso that the Secretary was responsible to execute the wishes of the President concerning "naval forces, ships, or war-like stores of the United States or to such other matters respecting military or naval affairs . . . ."[64] In the First Congress, during the course of discussion of a bill involving import duties, James Madison expressed the need for a naval force which he believed necessary "to provide a maritime defense against a maritime danger."[65] But no action was taken to create such a naval force. Even though the Government was largely controlled by Federalists, (chief supporters of the naval power), the creation of the Navy would have to await the impetus of a specific danger.

A few years later, the required catalyst took shape in the form of the Barbary Pirates. The pirates were actually small states along the North African littoral of the Mediterranean which found seizure of foreign merchant ships and ransom of their crews to be a convenient way to enlarge their national coffers. Of particular concern were the depredations of Algiers. The Algerine problem had been a thorn in the side of the American Republic since its founding. Diplomatic efforts to obtain the release of American seamen held for ransom proved unavailing.[66] Americans were spared the full effect of the Algerine menace so long as the Portuguese kept the pirates bottled up within the Mediterranean.[67] In October 1793, however, the Portuguese signed a truce with the Algerines permitting their passage into the Atlantic.[68] Since all major European maritime powers had by this time entered into treaties with, or purchased safe-conducts from, the Algerines, American merchant vessels became their sole target. Overnight, the Algerine situation acquired a new urgency.

Several courses of action were open to Congress. It could do nothing, requiring American merchant vessels to fend for themselves,[69] or it could hire the Portuguese to protect American interests.[70] Alternatively, as James Madison suggested, a cessation of hostilities could be purchased from the Dey.[71] Abraham Baldwin concurred in this proposal, noting that

63. H. SPROUT & M. SPROUT, *supra* note 41, at 26.
64. 2 ANNALS OF CONG. 2158–59 (1789).
65. 1 ANNALS OF CONG. 281 (1789).
66. M. SMELSER, *supra* note 55, at 51.
67. *Id.* at 35–44.
68. *Id.* at 51.
69. H. SPROUT & M. SPROUT, *supra* note 41, at 28.
70. 5 ANNALS OF CONG. 433 (1794).
71. *Id.* at 153.

"[b]ribery alone could purchase security from the Algerines."[72] The fourth alternative involved creating a naval force to protect American shipping.

In January, 1794, President Washington forwarded to the House a confidential communication regarding the Barbary Powers. The House met in secret session to consider the President's message.[73] During the course of this session, the House resolved to appropriate additional funds for diplomatic expenses, to provide "a naval force, adequate to the protection of the commerce of the United States against the Algerine corsairs . . ." and to appoint a committee to determine the size and cost of such a force.[74] After considerable debate, Congress passed the Naval Act of 1794.[75] The Act authorized the President to acquire six ships and specified the complement of each ship as well as the rates of pay of the officers and men. In specifying a purpose for the creation of this naval force, the Act stated straight-forwardly that "the depredations committed by the Algerine corsairs on the commerce of the United States render it necessary that a Naval Force should be provided for its protection."[76] To allay fears that this flotilla was to be a foot-in-the-door toward the creation of a standing navy, the Act specifically provided that the Presidential authorization would terminate "if a peace shall take place between the United States and the Regency of Algiers. . . ."[77]

Although the Algerine situation was the prime reason profered for the creation of a navy, proponents clearly envisioned broader usage—specifically, concern to protect American shipping interests from the effects of European wars and a desire to command respect from European nations.[78] The Administration desired that the vessels to be constructed would be superior, not just to the vessels of the Algerines, but "to any frigates belonging to any of the European Powers."[79]

Construction of the vessels had not been completed when, in 1796, a treaty was signed with the Algerines. Rather than halting work on the vessels as the plain language of the Naval Act seemed to require, the President went to Congress for instructions. After considerable maneuvering between pro-navy and anti-navy factions, Congress authorized comple-

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72. *Id.* at 434.
73. *Id.* at 433.
74. *Id.* at 154–55.
75. *Id.* at 1426, 1427.
76. *Id.*
77. *Id.* at 1428.
78. *See* H. SPROUT & M. SPROUT, *supra* note 41, at 33–34; M. SMELSER, *supra* note 55, at 64–69.
79. 1 AMERICAN STATE PAPERS, NAVAL AFFAIRS 6 (1794).

tion of three of the original six vessels.[80] Before these ships were off the ways, the opposing factions renewed their debate over the necessity of completing their construction. Ultimately, Congress appropriated sufficient funds to finish construction of the three vessels but not enough to man or equip them for sea.[81] Within a short time, however, deteriorating relations with France prompted still another reversal, and Congress passed "[a]n Act providing a Naval Armament," which authorized the President to man and employ the three frigates.[82]

As relations with France deteriorated, the good fortune of the pro-navy forces in Congress continued to swell. In the wake of the well-known "X.Y.Z. Affair,"[83] Congress passed "[a]n Act to provide an additional armament for the further protection of the trade of the United States and for other purposes."[84] This Act authorized the President to procure an additional twelve vessels not to exceed twenty-two guns each and provided for various housekeeping rules regarding conditions of enlistment, pay, etc., of naval personnel. Three days later, in light of the burdens placed on the Secretary of War in managing naval affairs, Congress enacted "[a]n Act to establish an Executive Department, to be denominated the Department of the Navy."[85] The Act provided that the chief officer of the Department "shall be called the Secretary of the Navy, whose duty it shall be, to execute such orders he shall receive from the President of the United States, relative to . . . employment of vessels of war . . . ."[86] This Act took the small public fleet and institutionalized it as a permanent national force.[87] In so doing, the Act breathed life into Article I, section 8, clause 13, of the Constitution. Significantly, however, the Act posed no substantive restrictions on how the fledgling naval force was to be utilized.

## III. Constitutional Considerations.

A. *The Use of the Navy as an Instrument of U.S. Foreign Policy.* The introductory material relating to the Navy's origin raises a threshold constitutional issue—whether the use of naval forces for foreign policy purposes is a proper exercise of governmental power. Although some may have envisioned using the Navy as a general instrument of foreign policy, the Framers authorized, and Congress established, a navy primarily for

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80. M. Smelser, *supra* note 55, at 77–82.
81. 6 Annals of Cong. 2339–2350 (1797).
82. M. Smelser, *supra* note 55, at 117.
83. For a discussion of the "X.Y.Z. Affair," see T. Bailey, A Diplomatic History of the American People 82–84 (2d ed. 1942).
84. 9 Annals of Cong. 3722 (1789).
85. *Id.* at 3724.
86. *Id.*
87. M. Smelser, *supra* note 55, at 158.

self-defense and the protection of commerce. History has shown, however, that the use of naval forces has not been limited to pursuit of such discrete objectives. To what extent then, if at all, does a broadened use contravene the constitutional grant of power to create a navy?

The answer lies in the landmark case *McCulloch v. Maryland*.[88] The issue before the Supreme Court was whether Congress could charter a national bank. In an opinion that has become a cornerstone of American constitutional construction, Chief Justice Marshall proclaimed a concept whose significance has transcended the specific issue before the Court: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[89]

The *McCulloch* rationale provides solid underpinnings for the use of naval forces as a general instrument of U.S. foreign policy. The power to engage in foreign relations and thus have a foreign policy is an inherent power of any state,[90] despite the lack of a specific textual anchoring point within the Constitution. Further, the earlier discussion of the utility of naval forces suggests they are plainly adapted to serving as an instrument of U.S. foreign policy. Finally, there exists no constitutional prohibition against such use of naval forces. Thus, *McCulloch* explicitly validates the use of naval forces as an instrument of foreign policy without resolving which branch of government shall direct the Navy in its foreign policy role.

B. *The Use of Force and the Textual Allocation of Power*. The constitutional authority to employ force in international relations is unclear. One Federal court asserted that "[t]he power to commit American military forces under various sets of circumstances is shared by Congress and the Executive."[91] This explanation may have hit the nail precisely on its judicial head, but it is an oversimplification that raises more questions than it answers. The main difficulty is that no constitutional provision clearly addresses the issue. Resolution must be sought in a mixture of the authority to conduct foreign affairs and the authority to wage war.

The source of congressional authority over the armed forces stems from explicit constitutional language. On the other hand, as Mr. Justice Clark

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88. 17 U.S. (4 Wheat.) 316 (1819).
89. *Id.* at 421.
90. Convention On Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881: "Art. 1. The State as a person of international law should possess the . . . capacity to enter into relations with other states."
91. Berk v. Laird, 429 F.2d 302, 305 (2d Cir. 1970).

once noted, "[t]he limits of presidential power are obscure."[92] Presidential power over the military flows from both the Constitution and from extra-constitutional sources. To futher complicate matters, the constitutional sanction for this Presidential authority arises as much from a web of judicial construction as from the plain language of the Constitution itself.

When the President and Congress act in concert, they clearly exercise all the Constitutional authority that the nation possesses.[93] In the foreign affairs arena, however, the boundary line between Presidential and congressional authority has been unclear since the nation's founding.[94] To a large extent, this continuing ambiguity is due to an unwillingness of the courts to act in this delicate area.[95] Additionally, the precise division of authority was not critical so long as the President and Congress cooperated fully in the initiation of foreign conflicts. The Korean Conflict was the first *extended* involvement of U.S. Armed Forces in combat operations in the absence of an express declaration of war by Congress.[96]

In some respects, this unanimity of action resulted from congressional deference to Presidential policy, which was undoubtedly more subconscious than planned. This tacit deference to the Executive seemed reasonably natural and a symbol of national sovereignty. Since the end of World War II, however, such deference has been less automatic. The reach of Presidential authority has been questioned during the last few decades far more than at any other time in our history. Consequently, determination of an exact division of authority between the legislative and executive branches has become more than an academic exercise.

1. *Congressional Power*. Congress' powers are defined in article I, section 8 of the Constitution. Three of the powers enumerated therein pertain to this discussion. Clause 11 authorizes Congress "[t]o declare War, grant letters of Marque and Reprisal, and make Rules concerning captures on Land and Water." As discussed earlier, clause 13 authorizes Congress "[t]o provide and maintain a Navy," and clause 14 empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces."

It is apparent that the Framers of the Constitution, as they drafted a new

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92. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 661 (1952) (Jackson, J., concurring).
93. *Id.* at 635 (Jackson, J., concurring).
94. S. REP. NO. 175, 84th Cong., 1st Sess. (1951).
95. E.g., Commonwealth v. Laird, 451 F.2d 26, 33 (1st Cir. 1971):
> As to the power to conduct undeclared hostilities beyond emergency defense, then we are inclined to believe that the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches, whose joint accord precludes the judiciary from measuring a specific executive action against any specific clause in isolation.
96. Note, *Presidential Power to Make War*, 7 IND. L. REV. 900 (1974).

framework of government, were influenced by the British experience. Specifically, the Drafters were concerned with the British "king's prerogative," which enabled him to take unilateral action in certain important matters, e.g., the raising of armies and navies, making treaties, and declaring war.[97] Fearing the development of monarchical tendencies in the new Republic, the Framers chose to invest Congress with exclusive war power.[98] It was a power too important to give to the President alone or jointly to the President and the Senate (as is the case of treaties).[99] The Framers intended that the decision to engage in war be made more difficult and deliberate by investing this responsibility in the entire Congress.[100] Despite this concern, history demonstrates some 150 instances of the belligerent use of American Armed Forces outside the borders of the United States.[101] Yet Congress has made a formal declaration of war only five times; and of the five, four declarations merely recognized the existence of an ongoing state of hostilities.[102] Obviously, Congress' constitutional grant of authority to "declare war" is not the only mechanism for triggering the belligerent use of U.S. armed forces.

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97. A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER 7 (1976). According to one reviewer, the work is a "masterful analysis of the conduct of our foreign policy during the formative years of the Republic when our early presidents were doing their best to interpret the Constitution and get the new Government off to a good start." Wilcox, Book Review, 73 AM. J. INT'L L. 148 (1979).
98. Senate Comm. on Foreign Rels., National Commitments, S. REP. NO. 797, 90th Cong., 1st Sess. 2 (1968).
99. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 80 (1972).
100. Atlee v. Laird, 339 F. Supp. 1347, 1356 (E.D. Pa. 1972).
101. Legislative Reference Service, Library of Congress (Background Information on the Use of United States Armed Forces in Foreign Countries, App. II (Comm. Print 1970)), 91st Cong., 2d Sess. [hereinafter cited as BACKGROUND INFORMATION]. Diverse methods of accounting explain statistical discrepancies in cited uses of force overseas. *Id.* at 15.
102. *Id.* at 24. The U.S. declaration of war on Japan is an example of recognizing the existence of an on-going state of war:

> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it resolved . . . that the state of war between the United States and the Imperial Government of Japan which has been thrust upon the United States is hereby formally declared. . . .

55 Stat. 795 (1941). The sole exception involved our first *declared* war in 1812: "War be and the same is declared to exist." 2 Stat. 755 (1812).

The records of the Constitutional Convention provide additional insight into the intended scope of the war power. The draft Constitution, as reported out of committee, would have authorized Congress to "make war."[103] However, during debates at the full convention, James Madison and Elbridge Gerry proposed limiting Congress to the power to "declare" rather than "make" war, thus "leaving to the Executive the power to repel sudden attacks."[104] Roger Sherman concurred in the need for this distinction: "The Executive shd. be able to repel and not to commence a war."[105] Thus, the Framers clearly did not intend to proscribe all force absent a congressional declaration; they merely intended to prohibit "war" without such approval. The significance of the amended wording is underscored by the observation of another delegate to the convention, Rufus King, who felt that the revised language was necessary because otherwise the phrase "make war" might be understood to mean "conduct war"—an Executive function.[106]

The provisions authorizing Congress to grant letters of marque and reprisal refers to an application of force short of war. A letter of marque and reprisal (a practice which fell into disuse during the nineteenth century) was simply a government license allowing private citizens to engage in acts otherwise amounting to piracy. This power had been held by Congress under the Articles of Confederation but was omitted from the draft of enumerated powers formulated by the Committee on Detail.[107] Charles Pinckney included it in a list of powers submitted to the Convention for consideration.[108] Elbridge Gerry also thought that mention should be made of such letters, since traditionally they were not included in the power of war.[109] There is, therefore, no persuasive evidence, as some have suggested,[110] to support a conclusion that such anachronistic language in the Constitution was intended to reserve to Congress all uses of force short of war.

2. *Presidential Power.*

a. *War Powers.* The Constitution states plainly that only Congress has the power to declare war. The records of the Convention also make

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103. II RECORDS, *supra* note 42, at 182.
104. *Id.* at 318.
105. *Id.*
106. *Id.* at 319.
107. ARTICLES OF CONFEDERATION, art. 9:
"The United States, in Congress assembled, shall have the sole and exclusive right and power of . . . granting letters of marque and reprisal in times of peace. . . ."
108. II RECORDS, *supra* note 42 at 324.
109. *Id.* at 326.
110. Kelley, *The Constitutional Implications of the Mayaguez Incident*, 3 HASTINGS CONST. L. Q. 304, 306 (1976).

clear that the President may act to repel sudden attacks. What neither makes clear is whether the President possesses additional authority to use force in the absence of a declaration of war by Congress.

Hamilton would have argued that the President does possess such authority. While only Congress can decide to go to war, when the decision of war or peace has already been made, as when another nation declares war on the United States, Congress need not act.[111] On the other hand, Hamilton cautioned that in the absence of a state of war, such actions must be defensive: "Anything beyond this must fall under the idea of *reprisals* and requires the sanction of that department which is to declare or make war."[112] This suggests that force may be utilized by the Executive in circumstances which do not amount to either the declaration of war or the execution of a reprisal. Thus, the Executive would not be prohibited from the use of *all* force, but only from *initiating* the use of force.[113] Where the Executive merely responds defensively, its use of force is permissible. To an inward-looking nation born in the late eighteenth century, countering a sudden attack with force was a common and vital response.

Although the Framers could not foresee the diverse circumstances under which this initiation-response distinction would later be tested, the basic rationale still applies.[114] The danger of the arbitrary application of Executive power appears lessened when the standard for the use of force is in response to an external threat. The Framers worried more over the need to avoid a "royal prerogative" which permitted the Executive to wield force by his own decision as a matter of national policy. Where response to an external stimulus was the basis for the use of force, the danger of its arbitrary application by the Executive was not so great. On the other hand, were force to be used to advance national objectives, it should be at the direction of the sovereign people, whose power reposes not in the President but in the Congress. At the same time, the Executive would retain

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111. 7 WORKS OF ALEXANDER HAMILTON 746–47 (J. Hamilton ed. 1851).
Hamilton's view was shared by another Framer of the Constitution, James Madison, who wrote:

> The only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has "been actually" produced by the conduct of another power, and then it ought to be made known as soon as possible to the Department charged with the war power. Such a case was the war with Tripoli during the administration of Mr. Jefferson.

Letter from James Madison to James Monroe (Nov. 16, 1827) *reprinted in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 600 (Cong. ed. 1867).

112. 6 WORKS OF ALEXANDER HAMILTON, *supra* note 111, at 209.

113. *See* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1773–74 (1968).

114. Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1255 (1969).

authority to employ force in special situations where a congressional mandate would be impractical. As Justice William H. Rehnquist observed:

> [T]he Framers did not intend to precisely limit the boundary between the power of the Executive Branch and that of the Legislative Branch. While rejecting the traditional power of kings to commit unwilling nations to war, they at the same time recognized the need for quick Executive response to rapidly developing international situations.[115]

What Justice Rehnquist characterizes as "rapidly developing international situations" may be described as "exigent circumstances." In view of modern communications, it would seem the Framers' interest in limiting Executive exercise of this extraordinary power—i.e., the power to counter a sudden attack—would today be broader than "rapidly developing situations." The Framers envisioned a situation in which there was insufficient time for congressional deliberation. During the last 200 years this original concept has evolved to keep pace with the transformation of the United States from an inward-looking agrarian society to a global industrial power. As the Supreme Court once noted: "Constitutional provisions do not change, but their operations extend to new matters as the modes of business and the habits of life of the people vary with each succeeding generation."[116] As used herein, the term "exigent circumstances" is intended to convey that same sense of urgency which the Framers presumably had in mind.

b. *Foreign Affairs*. Surpringly, the Constitution barely addresses the subject of foreign affairs. Article II of the Constitution begins with the sweeping statement that "the Executive Power shall be vested in a President of the United States of America."[117] For many commentators, including Alexander Hamilton, this recital was enough to grant the President full control over the field of foreign relations.[118] A specific enumeration of powers was not necessary since the President received total Executive power in contrast to Congress' specific grant in article I of "[a]ll legislative Powers *herein granted* . . . ."[119] Nor was there any perceived need to define Executive power since the Framers were well-schooled in the writ-

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115. Remarks by William H. Rehnquist, Assistant Attorney General, Dep't of Justice, before the Association of the Bar of the City of New York (May 28, 1970), *reprinted in* Background Information, *supra* note 101, at 14.
116. *In re* Debs, 158 U.S. 564, 591 (1895).
117. U.S. CONST. art. II § 1, cl. 1.
118. L. HENKIN, *supra* note 99, at 42.
119. U.S. CONST. art. I, § 1 (emphasis added).

ings of Locke, Montesquieu and Blackstone.[120]

Article II does, however, contain several specific grants of power to the President in the area of foreign relations. Article II, section 2, clause 2, provides that "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . ." This clause also authorizes the President, with the Senate's approval, to "appoint Ambassadors, other public Ministers and Consuls . . . ." Section 3 authorizes him to "receive Ambassadors and other public Ministers . . . ." Read together, these specific grants of power may *result* in other powers. For example, the power to send and receive ambassadors results in the power of recognition (or nonrecognition) of foreign governments. By similar reasoning, nearly every power germane to foreign affairs may emanate from the three powers enumerated above.[121]

Another explanation for the source of Presidential authority in the realm of foreign affairs was offered by Chief Justice Marshall when serving as a member of the House of Representatives. In Marshall's view, "[t]he President is sole organ of the nation in its external relations and its sole representative with foreign nations." [122] Unlike Justice Sutherland who later found the source of the Federal Government's power to be extra-constitutional,[123] Marshall saw the locus of the foreign affairs power within the Constitution:

> [The President] possesses the whole Executive powers. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.
>
> The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution since the person is named who conducts the foreign intercourse and is to take care that the laws be faithfully executed.[124]

Whether one views the President's authority in foreign affairs as flowing from inherent Executive power or resulting from the powers enumerated in article II, the President in fact exercises great control in this area. This

120. L. HENKIN, *supra* note 99, at 43.
121. *Id.* at 17.
122. 10 ANNALS OF CONG. 613 (1800).
123. E.g., United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936).
124. 10 ANNALS OF CONG. 613–14 (1800). A clear explanation of the need for Executive preeminence in the field of foreign affairs is provided by a case that arose from the seizure of hostages at the Embassy in Tehran, Iran, in 1979. In that case, which involved the lawfulness of a regulation requiring Iranian students in the United States to report to

control harmonizes with the President's other major role as Commander in Chief, since "[t]he essence of the conduct of foreign affairs is the maintenance of peace, the prevention of war . . . . The two coordinated powers, to conduct war and to prevent war, are executive functions under our Constitution."[125] Except for the regulation of foreign commerce, which is entrusted to Congress, the President has almost exclusive authority in foreign affairs. It is a power which is "delicate, plenary and exclusive . . . which does not require as a basis for its exercise an act of Congress, but which of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."[126]

Another view holds that the foreign affairs power is shared with Congress.[127] Under the Articles of Confederation, Congress exercised all authority over foreign affairs. Arguably, the President's powers are only those specifically enumerated, and every constitutional grant to the President is a derogation from Congress' original authority.[128] If one so views the foreign affairs power, what emerges is a congressional override authority. Although the notion of a separation of powers applies in the area of foreign affairs, there is no clear division of authority, rendering claims of usurpation difficult to resolve.[129] In describing this imprecise foreign affairs relationship between the President and Congress, one court noted: "The President, as the elected representative of the people of the United States, is the final word on the subject *in the absence of Congressional legislation*."[130] As a practical matter, however, Congress has generally permitted the Executive broad discretion in foreign affairs and has largely accepted

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an INS office or campus representative to "provide information as to residence and maintenance of nonimmigrant status," the court stated:

> Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not experts in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials.

Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir. 1979).

125. Worthy v. Herter, 270 F.2d 905, 910 (D.C. Cir.) *cert. denied*, 361 U.S. 918 (1959).
126. United States v. Curtis-Wright Export Corp., 299 U.S. 304, 320 (1936).
127. Reveley, *supra* note 114, at 1281.
128. L. HENKIN, *supra* note 99, at 33.
129. *Id.* at 31–32.
130. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 724 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961); *see also* Davi v. Laird, 318 F. Supp. 478 (W.D. Va. 1970). Addressing Congress' ability to control the President, the *Davi* court noted: "To an extent, it can restrict and qualify a President's conduct of foreign relations through resolution and other forms of legislation. If it so chooses, Congress may even resort to impeachment." *Id.* at 480.

that the President may deploy military forces for foreign affairs purposes.[131]

In practical terms, it makes little difference whether the President acts subject to congressional approval, or possesses exclusive power in foreign affairs. Whichever theory one accepts, there is no denying the President's dependence on Congress for the funding of his foreign policy.[132] If Congress does not approve of an administration's foreign policy, it simply does not fund it. Although a particular activity could be continued once funding had been provided in an annual appropriation, a Congress adamantly opposed to a President's actions could pass a resolution limiting such funds.

The division of the foreign affairs power is anything but clear. To some extent, presidents have usurped some of Congress' power in foreign affairs, and to some degree Congress has acquiesced in Executive control of the foreign policy machinery. This acquiescence may be attributed either to inertia or to a recognition by Congress that the Executive possesses inherent advantages in the conduct of foreign affairs. If the President is not the *de jure* authority in foreign affairs, he certainly has achieved the status as the *de facto* authority. And, from whatever source the President's authority flows, he is clearly dependent on congressional cooperation because of the almost inevitable funding requirement.

c. *Commander in Chief.* Article II, section 2 provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States . . . ." However, neither that section nor any other part of the Constitution explains how the President shall exercise this power or places any limits on his use of the forces provided. This vagueness prompted one Congressman to assert that "all the military force of the country is by the Constitution placed at the disposal of the President who is Commander in Chief of the land and naval forces . . . ."[133]

Courts which have considered the issue of the President's power as Commander in Chief have tended to construe it broadly. "[A]s Commander in Chief, the President has power to employ the Army and Navy in a

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131. L. HENKIN, *supra* note 99, at 100. One commentator noted the Presidential right to send troops abroad during peace time: "[T]he President, under his power as Commander in Chief of the Army and Navy, and his general control of the foreign relations of the United States, has the discretionary right constitutionally vested in him, and, therefore not subject to Congressional control." W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929).

132. U.S. CONST. art. I, § 9, cl. 7: "No money shall be drawn from the Treasury, but in consequence of appropriations made by law. . . ."

133. 7 ANNALS OF CONG. 1732 (1797).

manner which he may deem most effectual."[134] The power was placed in the hands of the President with only two restrictions set upon it: that Congress should have power 'to make rules for the government and regulation of the land and naval forces;' and that the appointment of officers should be 'by and with the advice and consent of the Senate.'"[135] Moreover, as the Supreme Court declared in an opinion by Justice Jackson, the President has the authority to do "[a]nything, anywhere that can be done with an army or navy."[136]

One must, however, proceed with great caution in the search for the outer limits to the President's power as Commander in Chief. In many instances, the courts have used sweeping language as justification for Executive action which seemed to be necessary for the public good. Careful analysis reveals, however, that the President's power as Commander in Chief cannot be painted with such a broad brush.

The debates of the Constitutional Convention paid little attention to the President's role as Commander in Chief—probably because the "propriety of this provision is so evident in itself . . . that little need be said to explain or enforce it. . . . Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguished the exercise of power by a single hand."[137] Even so, the debates contained nothing to suggest the creation of unlimited power to use the armed forces in situations unauthorized by Congress.[138] The Framers probably intended no more than to transfer civilian control of the armed forces from the Congress to the President, a change dictated by previous bad experiences with "war by Congress."[139]

Concerning the nature of the President's power as Commander in Chief, Hamilton offered that it

> would nominally be the same with that of the king of Great Britain. It would amount to nothing more than the Supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the *raising* and *regulating* of fleets and armies,

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134. Nordman v. Woodring, 28 F. Supp. 573, 576 (W.D. Ok. 1939).
135. Street v. United States, 24 Ct. Cl. 230, 247 (1889).
136. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952).
137. THE FEDERALIST NO. 74, *supra* note 46, at 462–63.
138. A. SOFAER, *supra* note 97, at 36.
139. *See* L. HENKIN, *supra* note 99, at 50. Article 9 of the Articles of Confederation provided in pertinent part that "The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . making rules for the government and regulation of said land and naval forces, and *directing their operations*." (Emphasis added).

> —all which, by the Constitution under consideration, would appertain to the legislature.[140]

There are several discernible aspects to the President's "[S]upreme command and direction of the military and naval forces." Most obvious is the "power to repel invasions,"[141] which, of course, is the power left to the Executive when the power to declare war was vested in Congress.

One of the obvious prerogatives that the President enjoys as Commander in Chief involves the deployment of forces. "As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command. . . ."[142] This power to determine the proper disposition or use of naval forces was established in an early Congress. In 1797, during consideration of a bill to provide additional naval forces, Albert Gallatin proposed an amendment to restrict new vessels to use within United States waters.[143] Among objections to this amendment, Representative Harrison Otis argued bitterly that the amendment

> appeared repugnant to the powers placed in the President by the Constitution. If a naval force was raised, it would rest with the President how it should be employed, as he was commander in chief. The Legislature could say whether the vessels should be employed offensively or defensively, but to say at what precise place they were to be stationed, was interferring [sic] with the duty of the commander in chief. . . .[144]

Gallatin's amendment lost by a margin of 11 votes—49 to 38.[145]

Similarly, justification for the first naval expedition to the Mediterranean in 1801 was rooted in the proposition that legislation providing for such forces implies the power to deploy them.[146] Once the forces are created, the President enjoys almost total control over them. At times, this control may transcend fiscal limitations. For example, during discussions in connection with the Navy Department appropriation bill for 1929, Senator Borah, Chairman of the Senate Foreign Relations Committee, remarked "[if] the Navy is in existence, if it is subject to command, [the President] may send it where he will in the discharge of his duty to protect

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140. THE FEDERALIST NO. 74, *supra* note 46, at 430.
141. United States v. Smith, 27 Fed. Cas. 1192 (C.C.N.Y. 1806) (No. 16,432).
142. Fleming v. Page, 50 U.S. (9 How.) 602, 614 (1850).
143. 6 ANNALS OF CONG. 289 (1797).
144. *Id.* at 290.
145. *Id.*
146. A. SOFAER, *supra* note 97, at 210.

the life and property of American citizens. Undoubtedly, he could do it, although the money was not in the Treasury."[147]

Moreover, the power to determine the *manner* in which hostilities are carried out clearly belongs to the President as Commander in Chief.

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such an interference with the command of the forces and the conduct of campaigns. That power and duty belongs to the President as Commander in Chief.[148]

In short, the Commander in Chief of the Armed Forces may "employ them in the manner he may deem effectual to harass and conquer and subdue the enemy."[149]

What is less clear is whether the President, as Commander in Chief, may initiate hostilities in the absence of congressional authority. This is a question that was bitterly debated during the Vietnam era. In *Mitchell v. Laird*, a suit by a Congressman to restrain prosecution of the war unless Congress explicitly authorized its continuation, a court of appeals stated that

> [t]here are some types of war which, without Congressional approval, the President may begin to wage; for example, he may respond immediately without such approval to a belligerent attack, or in a grave emergency he may without Congressional approval, take the initiative to wage war. Otherwise the country would be paralyzed. Before Congress could act the nation might be defeated or at least crippled. In such unusual situations necessity confers the requisite authority on the President. Any other construction of the Constitution would make it self-destructive.[150]

The court's conclusion echoes an earlier statement by Senator Borah, who cautioned: "The President of the United States should never employ the troops in foreign countries *when the Congress of the United States is available for consultation*, without coming to the Congress, except in

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147. 69 CONG. REC. 6760 (1928). On April 28, 1954, a rider to the Defense Department Appropriation bill was introduced seeking to limit the President's authority to send troops overseas without Congress' aproval. President Eisenhower stated that he would veto a bill containing such a provision. The rider did not pass. E. Robinson, Powers of the President in Foreign Affairs 1945–1965, at 100 (1966).

148. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

149. Fleming v. Page, 50 U.S. (9 How.) 602, 614 (1850).

150. Mitchell v. Laird, 448 F.2d 611, 613–14 (D.C. Cir. 1973).

purely a defensive way to protect life and property."[151]

These authorities suggest a limitation on the President's power to use force which is consistent with the Framers' original intent. The Framers envisioned that under "exigent circumstances" the Executive should be empowered to use force even before Congress could exercise its constitutional prerogative to declare war. The key problem lies in defining the spectrum of exigent circumstances in which the Executive may legitimately employ armed force without congressional authorization.

The first permissible use of force is defined in the debates of the Convention—the authority "to repel sudden attacks." As with the doctrine of self-defense, the right to repel a sudden attack does not justify punitive or offensive operations; it is a limited privilege that ceases when the danger has passed. Consequently, no congressional authorization is required to commence military operations against the armed force of an aggressor in the immediate area of an attack—either to stop the attack or to prevent its reoccurrence. This privilege, however, would probably not justify a Presidential order to commence operations against other units of the aggressor's forces located thousands of miles from the scene of the initial attack.

In the absence of specific congressional authorization, the President may use the armed forces to protect American citizens abroad. Such authority has been used frequently during the twentieth century, from the Boxer Rebellion to the attempted rescue of the American hostages in Iran. This protection is one of the "privileges and immunities" of citizenship.[152] As a practical matter, however, it is unlikely that the President would use the armed forces in this way unless either a substantial number of American citizens was imperiled or special considerations existed (e.g., an embassy takeover).[153]

The Executive may also direct the armed forces to the defense of an ally. National security requirements have changed radically since the Framers completed their work. When the Constitution was written, the United States was relatively isolated from the world. Just a few years after the Constitution was completed, Washington warned in his farewell address of the dangers of "entangling alliances." Although we were indebted to the Royal Navy for its role in maintaining the European balance of power, the United States was basically isolated and reliant on its own resources for defense. Consequently, modern notions of collective security were far from the minds of the Framers.

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151. 69 CONG. REC. 6754 (1928).

152. Slaughter House Cases, 83 U.S. 36, 79 (1872).

153. President Theodore Roosevelt did not feel so constrained. In 1904, Roosevelt sent several squadrons of American warships to Moroccan waters to secure the release of an American expatriate, Ion Perdicaris, who had been kidnapped by a Moroccan chieftain. The event is described in Hourihan, *Marlinspike Diplomacy: The Navy in the Mediter-*

History and technology have fundamentally changed our defense posture. Europe is now only hours away by supersonic aircraft, and any spot on the globe can quickly be reached by intercontinental ballistic missile. In the bipolar world that emerged from World War II, our foreign policy and defense policy have shifted to heavy reliance on a network of mutual-defense alliances.[154] An attack upon one ally constituted an attack against all.[155]

Although the Framers could not have anticipated the degree to which America would involve itself in such alliances, the use of armed force to support an ally is arguably one of the exigent circumstances justifying Executive action.[156] To paraphrase Chief Justice Marshall, the Constitution is not a document whose text can woodenly and slavishly be applied to situations not envisioned at drafting.[157] Rather, the words must be construed in light of their underlying purpose. Considering the realities of the current alliance system, such an approach would construe the doctrine of exigent circumstances to empower the President to commit forces in defense of an ally under attack. Where a mutual defense treaty existed, the President arguably would have a duty as well as the right to take such steps. This duty would arise from the legal obligation created by a treaty since "[i]nternational law is part of our law . . ."[158] and the Constitution mandates that the President "take care that the Laws be faithfully executed. . . ."[159] In any event, the President's constitutionally permissible use of such force would be limited to defensive measures since offensive measures would amount to war.

A more delicate question regarding the use of force by the President concerns a preemptive nuclear strike intended to neutralize an impending nuclear attack on the United States. Where the attack against the United States has been launched, exigent circumstances clearly exist due to the

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*ranean, 1904*, 105 NAV. INST. PROC. 42 (Jan. 1979).

154. *See generally* J. SPANIER, AMERICAN FOREIGN POLICY SINCE WORLD WAR II (6th ed. 1973).

155. North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964. Article 5 states in part:

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all . . . [I]f such armed attack occurs, each of them . . . will assist the other party or parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

156. *See* Meeker, *The Legality of U.S. Participation in Defense of Vietnam*, 54 DEP'T STATE BULL. 474, 484–85 (1966).

157. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

158. The Paquette Habana, 175 U.S. 677, 700 (1900).

159. U.S. CONST. art. II, § 3.

short time of flight of ballistic missiles. This same analysis yields a different result, however, in the case of a counterstrike. Any counterstrike launched after enemy missiles have landed, whether intended as counterforce or countervalue, would appear to be an act of retaliation and not an act of defense. Although the doctrine of exigent circumstances would permit the President to launch antimissile missiles, the doctrine does not appear to sanction a retaliatory strike.[160]

These scenarios demonstrate the elusive nature of the Executive's constitutional authority to use force. The doctrine of exigent circumstances permits the use of force by the Commander in Chief in many situations which overlap and encroach on Congress' war powers. Much depends on the President's own understanding of his role and the limits of his authority. Clearly, the President's power as Commander in Chief is not unlimited. In this role he serves primarily as first general and first admiral. Conceptually, the President's principal duty as Commander in Chief is to execute policy made by Congress. Unfortunately, this concept bogs down in the foreign affairs arena since it is the President who formulates policy, either by his constitutional mandate or by assumed power.

C. *Actual Uses of Naval Forces in Support of U.S. Foreign Policy.* Justice Holmes once mused that a page of history is worth a volume of logic,[161] an apt preface to a shift from an abstract discussion of the constitutional allocation of power to an examination of specific instances in which the President has employed naval forces for foreign policy purposes. How closely do these actual uses track with the language of the Constitution? What light can they shed on the development of the doctrine of exigent circumstances?

The only recorded judicial examination of Executive use of naval forces arose from an 1854 incident at Greytown, Nicaragua. The inhabitants of Greytown, acting under a purported grant of authority from the Mosquite Indians, attempted to establish a government independent of Nicaragua. Controversy soon broke out between the Provisional Government and an American-owned company holding a charter from the Nicaraguan Government. In February, 1853, an armed band, acting pursuant to governmental orders, destroyed some company property. The U.S.S. *Cyane* landed a Marine guard at Punta Arenos, across the river from Greytown, to protect the remaining company property. A year later, in Punta Arenos, the United States Minister to Central America prevented the forcible arrest of the master of a merchant vessel on a charge of murder.

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160. The President's action could be justified on another basis—i.e., by providing the President with the capability to take such time-critical action, Congress has implicitly delegated to the President limited authority under its war powers.

161. *See* O. HOLMES, THE COMMON LAW 1 (reprint 1938).

A later effort to arrest the Minister himself in Greytown resulted in his wounding and brief imprisonment.[162]

The U.S.S. *Cyane*, commanded by Commander George Hollins, was instructed to return to Greytown to obtain reparation for losses by local Americans and for indignities to the American Minister. Commander Hollins served notice that if American demands were not met, he would bombard the town after first allowing inhabitants to leave with their property. When the inhabitants refused to comply, the ship opened fire and destroyed Greytown.[163]

The President reported this action in his annual message to Congress,[164] as did the Secretary of the Navy in his annual report.[165] However, the incident appears to have stirred up little interest in Congress. The Congressional Globe contains not one word of protest regarding the action of either the President or the *Cyane*. The only apparent interest in the matter was shown by an attempt in the Senate to refer this part of the President's annual message to a select committee.[166] That attempt failed, and the matter was routinely referred to the Foreign Affairs Committee, never to be heard of again.[167]

Commander Hollins was later sued for destruction of the private property at Greytown. In answering the complaint, he argued that his acts executed orders from the President and Secretary of the Navy. To this defense the plaintiff demurred, contending that neither the President nor the Secretary possessed such authority, and thus the orders relied upon afforded no justification. In answering this contention, the court referred to article II, section 1 of the Constitution, granting the President executive power, and noted that it is to the President that

> [c]itizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the Constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed whether by negotiation or by force—a department of state and a department of the navy.
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> Now, as it respects the interposition of the executive abroad, for the

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162. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW 414–15 (1906).
163. *Id.* at 415–16.
164. CONG. GLOBE, 33rd Cong., 2d Sess. App. 3 (1854).
165. *Id.* at App. 20.
166. *Id.* at 29.
167. *Id.* at 68.

> protection of the lives of property of the citizen, the duty must, of necessity, rest in the discretion of the President.[168]

Turning to the case at hand, the court concluded: "[t]he question whether it was the duty of the President to interpose for the protection of the citizens at Greytown . . . belonged to the executive to determine; and his decision is final and conclusive. . . ."[169] Thus, the Greytown incident combines both congressional silence and judicial approval of the extraterritorial use of force by the President.

No discussion of the use of naval forces in furtherance of foreign policy would be complete without an examination of Commodore Matthew Perry's celebrated expedition to Japan. Perry was not the first American naval officer to attempt to open Japan to American commerce. An earlier attempt in 1846 by Commodore James Biddle had failed.[170]

Originally, Perry's mission was to have been headed by Commodore J. H. Aulick, commander of the East India Squadron.[171] Aulick fell ill, however, and Perry received command of the squadron.[172] Upon arrival in Japan, Perry delivered a letter in which President Fillmore exhorted the Emperor that their two countries "should live in friendship and have commercial intercourse with each other."[173] Having delivered this letter to the Emperor's representatives, Perry sailed away to await the Emperor's response. After Perry's return, a treaty was concluded between the United States and Japan in March 1854.

Congress had not previously approved this expedition, which began as a routine naval deployment ordered by the Executive.[174] In writing to the Secretary of the Navy concerning the scope of Perry's mission, the Secretary of State cautioned:

> He [Perry] will bear in mind that, as the President has no power to declare war, his mission is necessarily of a pacific character, and will not resort to force unless in self-defense in the protection of the vessels and crews under his command, or to resent an act of personal violence offered to himself or to one of his officers.[175]

The Secretary of the Navy, in his instructions to Perry, admonished that as

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168. Durand v. Hollins, 8 F. Cas. 11, 112 (S.D.N.Y. 1860) (No. 4,186).
169. *Id. See generally* Perrin v. United States, 4 Ct. Cl. 543 (1868).
170. Luce, *Commodore Biddle's Visit to Japan in 1846*, 31 NAVAL INST. PROC. 555 (1905).
171. C. PAULLIN, DIPLOMATIC NEGOTIATIONS OF AMERICAN NAVAL OFFICERS 1778–1883 at 246–47 (1912).
172. 5 J. MOORE, *supra* note 162, at 738.
173. *Id.* at 737.
174. CONG. GLOBE, 33rd Cong., 2d Sess., App. 19 1854).
175. Letter from Acting Secretary of State to Secretary of the Navy (Nov. 15, 1852) *reprinted in* 5 J. MOORE, *supra* note 162, at 737.

"Congress alone has power to declare war, too much prudence cannot be exercised, even in the great work in which you are engaged."[176]

Despite these admonitions, and the absence of an actual resort to force by Perry's squadron, the squadron was clearly employed in a coercive manner. President Fillmore himself is reported to have remarked that "[i]nstead of sending a single ship, it was thought best to send a somewhat formidable and imposing fleet as the show of power might be deemed a persuader in procuring a treaty."[177] That such a "persuader" had the desired effect is evidenced by more than simply the concluding of a treaty. According to Secretary of State William Marcy, the Commanding Officer of U.S.S. *Vincennes* ascribed the success in negotiating treaties in the Far East "and especially that of Commodore Perry, to the imposing naval force which accompanied that officer."[178]

The Senate's ratification of this treaty did not necessarily endorse the President's coercive use of naval forces for foreign policy purposes, since the value of the treaty may have outweighed the Senate's displeasure over the manner of its procurement. The congressional records of that period reveal that little, if any, inquiry was made about the legitimacy of the President's initiative. Such silence may have reflected a consensus that the coercive use of naval forces, at least where there is not actual resort to force, is solely a matter within the President's discretion. Alternatively, congressional silence may be interpreted as implied consent or ratification of the President's conduct. The former view stamps the President's use of naval forces with legitimacy. The latter view is simply precedent for later, similar uses of the Navy. Historically, a bold successful mission invites fewer questions than a catastrophe. Legitimacy, especially in the foreign affairs arena, is often a function of success.

President Grant, in the early stages of his administration, also made use of naval forces as an instrument of foreign policy when he became infatuated with the idea of annexing the Dominican portion of Santo Domingo Island. President Grant's desire for annexation seems to have been aroused by the Dominican President,[179] and his desire was fueled by the perceived need of strategic position and potential trade advan-

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176. Letter from Secretary of the Navy to Commodore Matthew C. Perry *reprinted in* 5 J. MOORE, *supra* note 162, at 739.
177. C. PAULLIN, *supra* note 171, at 253.
178. Letter from Secretary of State to Mr. Harris (Oct. 4, 1885) *reprinted in* 5 J. MOORE, *supra* note 162, at 740.
179. *See* Letter from Secretary of State to Commercial Agent at Santo Domingo City (Nov. 17, 1868) in 1 J. MOORE, *supra* note 162, at 590–91.

tages.[180] With this in mind, General O. E. Babcock, one of the President's private secretaries, was secretly dispatched to Santo Domingo in July 1869. About the same time, the Secretary of the Navy wrote to the commanding officer of one of the U.S. Navy vessels at the island and advised him to "remain at Samana, or on the coast of Santo Domingo, while General Babcock is there, and give him the moral support of your guns."[181] Although Babcock's instructions were limited to an inquiry into the conditions, prospects and resources of the island, he in fact negotiated a treaty of annexation.[182]

Whether the "moral support" supplied by the ship was necessary or incidental to woo the apparently willing Dominican President, Baez, is speculative. In any event, the treaty failed to obtain the requisite two-thirds consent of the Senate. Grant, however, was not content to let the matter die. Consequently, "[i]n view of the importance of this question [he] earnestly urge[d] upon Congress early action expressive of its views as to the best means of acquiring Santo Domingo."[183] Congress responded with a resolution appointing three commissioners to investigate the matter.

With the treaty of annexation pending (even after its rejection by the Senate), events in Haiti, the other nation occupying Santo Domingo, threatened the Dominican Government. President Grant, seeking to protect what has been described as an "inchoate interest" on the part of the United States,[184] responded by sending a strong naval force to protect the Dominican Government from both internal disorder and possible invasion. The ensuing congressional debate over the prospects of annexation thus had occasion to question the use of naval forces for foreign policy purposes in the absence of congressional authorization.

The most vocal opposition to the President's deployment of naval forces occurred in the Senate. Senator Carl Schurz attempted to amend the resolution which appointed commissioners so as to require withdrawal of

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180. Annual Message of the President, CONG. GLOBE, 43 Cong., 3d Sess. at 6 (1870). The United States had been interested in the island for a number of years. The Pierce administration sent Captain George B. McClellan, USA, to Santo Domingo in 1854 to gain concessions for a coal depot. *See* letter from the Secretary of State (Jan. 16, 1871), S. EXEC. DOC. NO. 17, 41 Cong., 3d Sess. at 3. The Administration of Andrew Johnson also sought some territorial concession or annexation of the island. *Id.* at 4–8.

181. 1 J. MOORE, *supra* note 162, at 275.

182. Letter from the Secretary of State (Jan. 16, 1871), S. EXEC. DOC. NO. 17, 41 Cong., 3d Sess. at 8–9.

183. CONG. GLOBE, 41st Cong., 3d Sess. 7 (1870).

184. C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 48 (1921).

185. CONG. GLOBE, 41st Cong., 3d Sess. 261 (1870).

naval forces already in the country.[185] The amendment was soundly rejected by a vote of 32-12.[186] The comments of Senator James Harlan typify the overwhelming support for President Grant's actions:

> Surely no member of this body . . . would undertake in this way to control the official action of the Commander in Chief of the Army and Navy of the United States to direct by statute the movement of our squadrons at sea. Such legislation, I think, would be new in any enlightened country. The Constitution of the United States confers on the President some prerogatives: he is declared to be the Commander in Chief of the Army and Navy—of all the armed forces of the United States.[187]

The use of naval forces at Santo Domingo was later questioned by Senator Charles Summer, Chairman of the Senate Foreign Relations Committee. Senator Summer introduced a lengthy resolution "regarding the employment of the Navy of the United States on the coasts of St. Domingo during the pendency of negotiations for the acquisition for that part of the island." Included within the draft resolution was the following condemnation:

> The employment of the Navy without the authority of Congress in acts of hostility against a friendly foreign nation or in belligerent intervention in the affairs of a foreign nation, is an infraction of the Constitution of the United States and a usurpation of power not conferred upon the President.[188]

This resolution met a fate similar to Senator Schurz's earlier amendment when it was tabled by a vote of 39–16.[189]

Controversy surrounding the would-be annexation of the Dominican Republic became the first case in which the Executive's unilateral use of naval forces in support of foreign policy was seriously questioned. Efforts to limit the President's discretion in foreign policy were defeated by substantial margins. Significantly, these limitation efforts failed *after* the Senate had rejected the annexation treaty. Despite the Senate's general opposition to Grant's Dominican initiative, there was considerable reluctance to interfere with the Presidential deployment of the Navy.

The U.S. Navy's role in the independence of Panama also deserves mention. At the time the United States chose the Isthmus of Panama as the preferred route for a transoceanic canal, Panama was still a Department of

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186. *Id.* at 265. A subsequent attempt to amend the House version of the bill also failed. *Id.* at 431.
187. *Id.* at 261.
188. CONG. GLOBE, 42nd Cong., 1st Sess. 294 (1871).
189. *Id.* at 329.

Colombia. Negotiations between the U.S. Secretary of State, John Hay, and the Colombian chargé in Washington, Thomás Herran, produced the Hay-Herran Treaty. Under the terms of this agreement, the United States was to obtain a canal zone 6-miles wide for a cash payment of $10,000,000 and an annual annuity of $250,000. The treaty passed the U.S. Senate but was rejected by the Colombian Congress.[190]

This, of course, posed a dilemma for President Theodore Roosevelt. One solution would have been to use the alternate, previously rejected, Nicaraguan route for the canal. Domestic unrest in Panama offered an easier solution. Under the terms of an 1846 Treaty with Colombia, the United States was bound to maintain the "perfect neutrality" of the Isthmus in order to guarantee "free transit."[191] On seven previous occasions, U.S. forces had intervened to guarantee such free transit.[192] Phillippe Bunau-Varilla, a French lobbyist for the New Panama Canal Company seeking to sell its interests to the United States, became convinced from conversations with Roosevelt, Hay, and others that the United States would not allow a Panamanian revolution to fail. Bunau-Varilla advised his coactors in Panama that the U.S.S. *Nashville* would arrive at Colon, Panama on November 2, 1903. When the ship arrived on time, this was interpreted widely as a sign of United States' support for the revolutionary forces and the revolution began.[193] Orders were quickly messaged to the *Nashville*: "In the interest of peace make every effort to prevent Government troops at Colon from proceeding to Panama. The transit of the Isthmus must be kept open and order maintained."[194] The Colombian Government queried the State Department:

> Will you allow Colombian Government to land troops at those ports [Panama and Colon] to fight there and in the line of railway? Also if the Government of the United States will take action to maintain Colombian rights and sovereignty on the Isthmus in accordance with article 35, the treaty of 1846, in case Colombian Government is entirely unable to suppress the secession movement there?[195]

Secretary Hays responded five days later: "It is not thought desirable to

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190. T. BAILEY, *supra* note 83, at 537–39.
191. Treaty of Peace, Amity, Navigation, and Commerce, Dec. 12, 1846, United States-New Granada, 9 Stat. 881, T.S. No. 56.
192. These landings occurred in 1860, 1865, 1868, 1873, 1885, 1895 and 1901. 119 CONG. REC. 25068–69 (1973).
193. T. BAILEY, *supra* note 83, at 540–41.
194. Message from State Dep't to U.S.S. *Nashville* (Nov. 3, 1903), *reprinted in* [1903] FOREIGN RELATIONS OF THE UNITED STATES 231. [hereinafter cited as "FOREIGN RELATIONS"].
195. Telegram from United States Legation, Bogota, Colombia to State Dep't (Nov. 17, 1903), *reprinted in* 1903 FOREIGN RELATIONS at 2412.

permit landing of Colombian troops on Isthmus, as such a course would precipitate a civil war and disturb for an indefinite period the free transit which we are pledged to protect."[196]

The precise role that the *Nashville* had in encouraging the insurgents cannot be ascertained. It is clear, however, that the State Department expected an uprising. On November 2nd, the day before the revolution, the Navy Department messaged *Nashville*: "Maintain free and uninterrupted transit. If interruption threatened by armed forces, occupy the line of railroad . . . Government force reported approaching the Isthmus in vessels. Prevent their landing if in your judgment this would precipitate a conflict."[197] *Nashville's* response, early on the following day, included the statement: "no revolution has been declared on the Isthmus and no disturbances."[198]

Whether the Executive Branch used naval forces in Panama for the express purpose of encouraging and/or influencing the outcome of the revolution is uncertain. The evidence suggests so; but President Roosevelt denied complicity in the affair: "no one connected with this government had any part in preparing, inciting or encouraging the late revolution on the Isthmus of Panama."[199] Congress, however, was skeptical of Roosevelt's protestation of innocence. Remarks by Senator Patterson typified Senate sentiment. Senator Patterson complained that:

> He [the President] had conceived the probability of the secession of Panama under his guidance. He does not pretend that he did not express his opinion and desires freely; and that being the case it is no violence to the President to suggest that his views and purposes were known, considered and believed in by those who comprised the Panama revolutionary justice.[200]

Roosevelt's action touched off a furor in Congress, including at least one

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196. Telegram from State Dep't to United States Legation, Bogota, Colombia (Nov. 11, 1903), *reprinted in* 1903 FOREIGN RELATIONS at 2413.
197. Message from Navy Dep't to U.S.S. *Nashville* (Nov. 2, 1903), *reprinted in* 1903 FOREIGN RELATIONS at 247.
198. Message from U.S.S. *Nashville* to Secretary of the Navy (Nov. 3, 1903) *reprinted in* 1903 FOREIGN RELATIONS at 249.
199. 38 CONG. REC. 959 (1904).
200. *Id.* at 919. Senator Teller reported that "Mr. Amador—and he was one of the originators of the revolution—declared publicly that but for the fact that the people of Panama knew the Government of the United States would assist them they would not have entered into the revolution. . . ." *Id.* at 968.
201. 38 CONG. REC. 710.

call for impeachment.[201] Many shared Senator Carmack's opinion that "[t]here was no cause for intervention by anybody, but under no circumstances could the right belong to the President of the United States, because intervention is war, and the right to begin war belongs to Congress and not to the President."[202] The Senator later asked rhetorically: "If the President can lead the Navy of the United States to assist a gang of French adventurers to dismember an American Republic, when may he not do the same thing elsewhere?"[203]

A resolution condemning the President's action was introduced in the Senate. It specified that "[t]he armed intervention aforesaid was making war against Colombia on the part of the President of the United States without the sanction of the Congress of the United States and was in violation of the provision of the Constitution which gives to Congress alone the power to declare war."[204] This draft resolution was committed to the Senate Foreign Relations Committee,[205] never to be heard of again.

Another notable incident occurred when naval forces were used to avenge a perceived insult to national honor in Mexico prior to World War I. At the time, General Huerta had assumed power in Mexico but the United States had not recognized his Government. American sympathies lay with the constitutionalists of the rival Carranza Government. Despite the conflict within Mexico between rival forces, and even though the Huerta Government was not recognized by the United States, American naval vessels continued to make visits to Mexican ports. During one visit, in April 1914, an officer and seven crewmembers from the U.S.S. *Dolphin*, who had gone ashore on official business, were apprehended by a squad of Mexican soldiers at Tampico and marched to the local headquarters. The seriousness of this incident was exacerbated by the fact that two of the men were apprehended while aboard a whaleboat flying the American flag. A senior Mexican officer intervened and the Americans were quickly released.[206] Despite an immediate apology from the local Mexican general, this incident generated an enormous storm of protest from American authorities.

The senior American officer present, a rear admiral embarked in *Dolphin*, initially demanded assurances that the Mexican officer responsible for the arrests would be severely punished. The admiral insisted further that the local military commander "publicly hoist the American flag in a prominent position on shore and salute it with twenty-one guns, which

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202. *Id.* at 706.
203. *Id.* at 709.
204. *Id.* at 1033.
205. *Id.* at 1302.
206. Message from Commander, Detached Squadron U.S. Atlantic Fleet to Secretary of the Navy (Apr. 11, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 451–52.

salutes will be duly returned by this ship."[207] The admiral's ultimatum was reported up the chain of command to President Wilson who concurred in the demands.[208] The situation worsened several days after the Tampico incident when a mail orderly from the U.S.S. *Minnesota* was arrested in Vera Cruz.[209] A few days later, the Secretary of the Navy ordered a large deployment of naval vessels, including seven battleships, into Mexican waters.[210]

Suspicious of American trickery, Huerta would not authorize the demanded salute without a protocol promising a return salute.[211] Concerned that such a protocol would be interpreted as *de facto* recognition of the Huerta Government, President Wilson refused the request.[212] When General Huerta in turn refused to cooperate with American exhortations that the Mexican Government fire the first salute, President Wilson addressed a joint session of Congress in which he sought Congress'

> approval that I should use the armed forces of the United States in such ways and to such an extent as may be necessary to obtain from General Huerta, and his adherents the fullest recognition of the rights and dignity of the United States. . . .
>
> There can in what we do be no thought of aggression or of selfish aggrandizement, we seek to maintain the dignity and authority of the United States only because we wish always to keep our great influence unimpaired for uses of liberty, both in the United States and wherever else it may be employed for the benefit of mankind.[213]

The House passed a resolution that same day conferring upon the President the authority he had requested.[214] The Senate, however, adjourned without acting.

The following day, in the absence of Senate action on the resolution, Navy and Marine Corps personnel landed at Vera Cruz.[215] Although the Senate had not acted, the decision to land apparently was prompted by the

207. Message from Rear Admiral Mayo, USN, to Commanding General Mexican Forces, Tampico, Mexico (Apr. 9, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 448.
208. Telegram from Secretary of State to American Chargé d'Affaires, Mexico (Apr. 11, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 452.
209. Telegram from American Consul, Vera Cruz, Mexico to Secretary of State (Apr. 12, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 455.
210. Telegram from Secretary of State to American Chargé d'Affaires, Mexico (Apr. 14, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 459.
211. Telegram from American Chargé d'Affaires, Mexico to Secretary of State (Apr. 18, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 469.
212. Telegram from Secretary of State to American Chargé d'Affaires, Mexico (Apr. 19, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 471.
213. 51 CONG. REC. 6909 (1914).
214. *Id.* at 6958.
215. Telegram from American Consul, Vera Cruz, Mexico to Secretary of State (Apr. 21, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 479.

withdrawal of the local Mexican general.[216] The words of Secretary of State William Jennings Bryan reflected the Administration's view on the lack of an authorizing resolution. Bryan observed that the "resolution is not necessary to justify the President in his action [and] he is at liberty to take such action as he may deem proper, except declaration of war, without waiting for the resolution to pass."[217]

Later, on the day of the landing, the Senate passed an amended version of the resolution[218] which the House approved the following day.[219] Interestingly, the amended resolution provided that the President was "justified" rather than "authorized" to use the armed forces. Did Congress in fact view the use of naval forces prior to the passage of the resolution as a permissible exercise of presidential power? Perhaps, but the amended wording of the resolution does not support such a conclusion since the change in wording "was done to emphasize the fact that the resolution is not a declaration of war but contemplates only the specific redress of a specific injury."[220] On the other hand, there is nothing to suggest that Congress was less than satisfied with President Wilson's use of naval forces under the circumstances.[221]

D. *Constitutional Evaluation*. As discussed earlier, the Constitution allocates to Congress the war power whereas the President is not only Commander in Chief but is also charged with the foreign affairs power. In practice these apparently discrete powers overlap in a subtle pattern of checks and balances. Although Congress has the power to commit the nation to war, the President may employ force in exigent circumstances. And while the President is Commander in Chief and in charge of foreign affairs, he is subject to Congress' power of appropriation and its power to make rules and regulations governing land and naval forces.

To further cloud matters, the use of naval forces to implement foreign policy is usually neither an exercise of the congressional war power nor a case of exigent circumstances under which the President could claim authority to act. This common use of naval forces may well not have been envisioned by the Framers. At the time the Constitution was written, the

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216. *See* Telegram from American Consul, Vera Cruz, Mexico to Secretary of State (Apr. 21, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 477.
217. Telegram from Secretary of State to American Chargé d'Affaies, Mexico (Apr. 21, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 478.
218. 51 CONG. REC. 7014 (1914).
219. *Id.* at 7078.
220. Circular telegram from Secretary of State to various American diplomatic missions (Apr. 22, 1914), *reprinted in* 1914 FOREIGN RELATIONS at 483.
221. For the sake of completeness, it is worth noting that naval forces held the city for only nine days. On 30 April the city was formally turned over to army forces. A Military Government established on 2 May controlled the city until the last American troops

United States was a small, agrarian country. Few statesmen of that era envisioned America as a major power with a navy having a significant capacity for influencing world events. In addition, "war" embraced nearly all public uses of force in the eighteenth century. Therefore, little thought was given to those uses of force that did not amount to war. However, as the Supreme Court has noted, the Constitution "was made for an undefined and expanding future. . . ."[222]

The experiences of the past 200 years, some of which were described earlier, reveal how American decisionmakers breathed life into constitutional ambiguity—the ambiguity as to if, when, and how the Navy should be deployed as an instrument of foreign policy.

In each of the five historical episodes already recounted, the Executive acted on his own initiative in using naval forces as an instrument of his foreign policy. In the Vera Cruz incident, the only instance in which the Executive sought congressional approval of his intended course of action, pressing circumstances dictated that the landing operation begin before Congress had acted. In that instance the Executive maintained that no congressional authority was necessary, thus suggesting that President Wilson consulted Congress only as a matter of courtesy. The absence of congressional condemnation of the President's action—an action taken prior to passage of the Joint Resolution—supports such a viewpoint.

In several instances, emphatic congressional opposition emerged to the use of naval forces without congressional approval. Although congressional unanimity in accepting Presidential action is the exception rather than the rule, in the five cases reviewed, efforts to condemn Executive use of naval forces failed by substantial margins. As a result, a practice has emerged over the years in which Congress has permitted the President to use naval forces in support of foreign policy objectives without requiring prior approval. In many cases, such uses have amounted simply to passive naval presence intended to influence events by a subtle show of interest. In other cases, the use of naval forces has been more coercive, involving the actual discharge of weapons. Regardless of the degree of coercion employed, however, Congress has tacitly accepted the Executive practice of wielding the Navy as an instrument of foreign policy. But did Congress' acceptance of such a practice validate it constitutionally?

One theory considers the practice itself as evidence of constitutional

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withdrew from Vera Cruz on 23 November 1914. *See generally* 1914 FOREIGN RELATIONS at 494–95, 626.

222. Hurtado v. California, 110 U.S. 516, 530–31 (1884). *Accord* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819). *McCulloch* noted that the Constitution is

> intended to endure for ages to come, and consequently to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the

meaning. John Bassett Moore suggested as much when he wrote long ago that "[t]he law of the Constitution is not more to be found in the letter of that instrument than in the practice under it. . . ."[223] Judge Moore's view was validated by the Supreme Court a few years later in *United States v. Midwest Oil Co.*, a case which examined the validity of withdrawing certain lands from a public acquisition scheme approved by Congress. Regarding the long-established Executive practice of land withdrawals, the Court observed that

> [i]t may be agreed that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is . . . the basis of a wise and quieting rule . . . in determining . . . the existence of a power, weight shall be given to the usage itself. . . ."[224]

The Court cited other cases to support the proposition that where the Constitution leaves a question of power in doubt, effect must be given to the "contemporaneous and long continued previous practice. . . ."[225] The Court went on:

> Nor do these decisions mean that the Executive can by his course of action create a power. But they do clearly indicate that the long continued practice, known to and acquiesced in by Congress, would

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character of the instrument, and give it the properties of a legal code.

*Id.* at 415 (emphasis by the Court).

223. Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385, 417 (1905).

224. 236 U.S. 459, 472 (1914).

225. McPherson v. Blacker, 146 U.S. 1, 36 (1892). Several earlier cases considered the effect of practice on constitutional interpretation. These cases were concerned generally with the principle of "contemporary construction." *Cf.* Stuart v. Laird, 5 U.S. (1 Cranch) 298 (1803) as it refers to the practice of Supreme Court Justices sitting as circuit judges without a separate commission. As the Court noted: "To this objection . . . it is sufficient to observe, that practice and acquiescence under it for a period of several years . . . affords an irresistible answer, and has indeed fixed the construction. It is a contemporary exposition of the most forcible nature." *Id.* at 308. The principle of "contemporary construction" is more effectively illustrated by the later decision United States v. Barnett, 376 U.S. 681 (1964), which noted: "It will be remembered that this legislation was enacted by men familiar with the new Constitution. Madison urged passage of the act in the House and five of the eight members of the Senate Committee which recommended adoption, were also delegates to the Constitutional Convention of 1787." *Id.* at 693. *See* Knight v. Shelton, 134 F. Supp. 423 (E.D. Ark. 1905) (construing Arkansas Constitution) which observed that, "in order to influence courts by contem-

> raise a presumption that the withdrawals had been in pursuance of its consent or of a recognized administrative power of the Executive. . . .[226]

*Midwest Oil* and its progeny[227] demonstrate that the Constitution cannot be read *in vacuo*. Not only must the language be analyzed, but consideration must also be given to how the legislative and executive branches have historically applied this language. In such cases "the practical construction of the Constitution . . . should not be overruled upon a conviction that such . . . was clearly incompatible with the supreme law of the land."[228]

A second approach to analyzing a practice, seemingly at variance with the Constitution, is suggested by Professor Myers McDougal. Professor McDougal contends that usage is actually a means of amending the Constitution.

> In innumerable respects, the division of function between the different branches of the Government and the scope of federal authority as clearly contemplated by the Framers, have been altered by usage and prescription, without resort to formal textual amendment. 'For every time that the Constitution has been amended,' as Justice Byrnes has pointed out, 'it has been changed ten times by custom or judicial construction.' This process of constitutional evolution has by no means been restricted to the numerous phases of government which the draftsmen deliberately left ambiguous or unsettled; in many instances the very words and phrases of the written Constitution have been given operational meanings remote from the intention of their original penmen.[229]

*Missouri v. Holland*, which considered the validity of a statute implementing a treaty involving migratory birds, lends support to this view. In upholding the statute, the Supreme Court said:

> [W]hen we are dealing with words that also are a constituent act, like

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poraneous construction, that construction must have been uniform and within a reasonable time of the enactment of the provisions thus construed." *Id.* at 433.

226. U.S. at 474.

227. Ever since *Midwest Oil*, the Court has continued to emphasize the role of practice in constitutional interpretation. *See, e.g.*, United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936), in which the Court observed:

> A legislatve practice such as we have here, evidenced not by only occasional instances but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice. . . .

*Id.* at 327–28. *Accord* Ray v. Blair, 343 U.S. 214 (1952); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973).

228. Field v. Clark, 143 U.S. 649, 691 (1891).

229. McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (Pt. 1), 54 YALE L. J. 181, 291–92 (1945)

> the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.[230]

In other words, *Missouri v. Holland* suggests that the Constitution, drafted almost two hundred years ago, is but a framework for government with the necessary details to be supplied later. The informal amendments of which Professor McDougal writes are major sources of this detail.

Either of these two interpretative approaches would establish the constitutional validity of the long-established practice by which the President uses naval forces as an instrument of his foreign policy. Under the first theory, longstanding congressional acquiescience to the practice points to the existence of such power without any need to specify its exact constitutional basis. Under the latter theory, the practice itself creates the power by informal amendment of the Constitution. Having established that congressional acquiescence has either recognized or created authority in this area, it is appropriate to turn next to an analysis of legislative restrictions on the use of naval forces.

## IV. Legislative Restrictions on the Use of Naval Forces.

Statutory authority governing the use of naval forces for foreign policy purposes is not clear. Congress has provided that:

> The Navy shall be organized, trained, and equipped *primarily* for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war *except as otherwise assigned* and is generally responsible for naval reconnaissance, submarine warfare and protection of shipping. (Emphasis added.)[231]

This language is consistent with the role assigned to the Navy by the

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(citations omitted). Eleven years after McDougal and Lans' article, Ullman v. United States, 350 U.S. 442 (1956), noted that: "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." *Id.* at 428. In *Ullman*, the petitioner claimed a substantive right which exceeded fifth amendment protection. Present discussion, however, concerns the distribution among various branches of government of a power clearly possessed by the sovereign.

230. 252 U.S. 416 (1920); *see also* C. Black & R. Eckhardt, The Tides of Power 6 (1976).

231. 10 U.S.C. § 5012 (1976) (emphasis added).

National Security Act of 1947.[232] Unfortunately, the legislative history of that Act does not provide any clarification. However, as the Senate Armed Services Committee report notes, "the structure provided by the bill facilitates Presidential control of the armed forces, and enables Congress to examine . . . the requirements and development of the armed forces. . . ."[233] This statement, taken at face value, is tantamount to a recognition by Congress that its role is to *provide* forces, and the President's role is to *use* them.

Congress' hands-off attitude toward Executive use of the armed forces has been reflected historically in the general discretion contained in the annual appropriation bill. Defense appropriations typically cover broad categories of expenses with few substantive restrictions on how the Executive may spend the funds. For example, the FY-79 appropriation for Operations and Maintenance, Navy, contains the following language:

> For expenses, not otherwise provided for, necessary for the operation and maintenance of the Navy and the Marine Corps, as authorized by law . . . $11,691,000,000. . . . *Provided*, that of the total of this appropriation made available for the alteration, overhaul, and repair of naval vessels, not more than $2,100,000,000 shall be available for the performance of such work in Navy shipyards of which not less than $22,000,000, shall be available for such work only at the Ship Repair Facility, Guam. . . .[234]

To the extent that some legislative restrictions have been placed on the Executive's use of naval forces, such limitations are personnel-oriented, not mission-oriented. For example, women are statutorily prohibited from duty on either vessels or aircraft engaged in combat missions and, except for temporary duty, from ships other than hospital ships, transports and similar vessels not expected to be assigned combat missions.[235] Congress has also specified that officers of naval vessels must be citizens of the United States.[236]

In general, Congress has not sought to impose any limitations on the use of the Armed Forces. One notable exception is the so-called Posse Comitatus Act, which prohibits the use of the Army and Air Force in a law

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232. Pub. L. No. 80-253, 61 Stat. 495, 501 (1947).
233. S. REP. No. 239, 80th Cong., 1st Sess. *reprinted in* [1947] U.S. CODE CONG. AD. NEWS 1487, 1500.
234. Pub. L. No. 95-457, 92 Stat. 1233 (1978).
235. 10 U.S.C. § 6015 (1976). *But see* Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978), wherein the court held that the broad restrictions contained in 10 U.S.C. § 6015 were constitutionally infirm.
236. 10 U.S.C. § 6019 (1976).

enforcement capacity.[237] Although the literal language of the statute does not apply to naval forces,[238] it has been held to preclude any similar use of such forces, and the Secretary of the Navy has determined that his Department will observe the spirit of the Act as a matter of policy.[239] Should, however, the President ever need military forces in order to "take care that the law be executed," the Posse Comitatus Act may well clash with his constitutional responsibilities.

The War Powers Act, passed in the wake of congressional frustration and dissatisfaction over the Nixon Administration's handling of matters in Southeast Asia in the early 1970s, has the greatest potential impact of any statute on the use of naval forces.[240] Congress' initial role during the Vietnam period can generally be described as acquiescence. American military involvement in Vietnam resulted from Presidential decisions in which congressional participation was limited to the appropriation of necessary funds. The exception was the Gulf of Tonkin Resolution.[241] Here, Congress not only authorized the President to take all necessary steps (including use of armed forces) to assist SEATO members, but Congress also approved Presidential action directed toward repelling an attack against two American destroyers. As public dissatisfaction mounted concerning American participation in Vietnam, Congress began to play a more vigorous role.

Congress first sought to assert itself in June, 1969 with the passage of the National Commitments Resolution, which expressed the

> sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and the legislative branches of the United States Government by means of a treaty, statute or concurrent resolution of both houses of Congress specifically providing for such commitment.[242]

As a "sense" resolution, it had no binding effect but did indicate the

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237. 18 U.S.C. § 1385 (1976).
238. United States v. Walden, 490 F.2d 372–12 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974). *See* Meeks, *Illegal Law Enforcement—Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83 (1975).
239. U.S. Dep't of Navy, Secretary of the Navy Instruction 5820.7, Posse Comitatus Act (1974).
240. *See* Cruden, *The War-Making Process*, 69 MIL. L. REV. 35 (1975); Emerson, *War Power Legislation*, 74 W. VA. L. REV. 53 (1971); Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 WM. & MARY L. REV. 823 (1975).
241. Pub. L. No. 88-408, 78 Stat. 384 (1964).
242. S. Res. 85, 91st Cong., 1st Sess. (1969).

congressional mood and was a harbinger of things to come.[243]

Congress' frontal assault on Presidential prerogatives in Southeast Asia began with one of its most powerful but often neglected weapons—the appropriations power. An amendment to the 1970 Department of Defense Appropriation Act specified that "none of the funds appropriated by this Act shall be used to finance the introduction of American ground troops into Laos or Thailand."[244] This same limitation also appeared in the next two appropriation bills,[245] and Congress used a similar tactic to pressure the President regarding incursions into Cambodia.[246]

In early 1971, Congress repealed the Gulf of Tonkin Resolution on which the President had relied so heavily in justifying his policy in Southeast Asia.[247] However, neither the President[248] nor the courts[249] considered that such a cancellation in turn terminated Executive authority over Vietnam policy.

The true catalyst behind congressional action which ultimately resulted in passage of the War Powers Act was the invasion of Cambodia and the resulting public outcry.[250] In the wake of those events, the House Subcommittee on National Security Policy began a series of hearings that resulted in a House Resolution imposing limitations on the President's right to commit forces to combat.[251] The Senate failed to act, however, and the measure died with the end of the 91st Congress. Over the next several years, both houses of Congress considered similar proposals. Finally, in October, 1973, a compromise version passed both Houses.[252] President Nixon vetoed the bill on the basis that it was "both unconstitutional and

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243. *But see* United States v. Pink, 315 U.S. 203 (1942) in which the Court held that the President is empowered to enter into Executive agreements which bind the United States and thus become "national commitments."
244. Pub. L. No. 91–171, 83 Stat. 469, 487 (1969).
245. Pub. L. No. 91–668, 84 Stat. 2020, 2038 (1971); Pub. L. No. 92–204, 85 Stat. 716, 735 (1971).
246. Cruden, *supra* note 240, at 64–65.
247. Pub. L. No. 91–672, 854 Stat. 2053, 2055 (1971).
248. *See* Cruden, *supra* note 240, at 61.
249. Da Costa v. Laird, 448 F.2d 1368 (2d Cir. 1971), *cert. denied*, 405 U.S. 979 (1972).
250. Cruden, *supra* note 240, at 60–61.
251. H.R. J. Res. 1355, 91st Cong., 2d Sess. (1970).
252. 119 CONG. REC. 33569, 33873 (1973).

dangerous to the best interests of our nation."[253] Congress, however, overrode the veto.[254]

The stated purpose of the War Powers Act is to

> fulfill the intent of the framers of the Constitution of the United States and ensure the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement into hostilities . . . is clearly indicated by the circumstances. . . .[255]

The Act goes on to recite Congress' power under the "necessary and proper clause" to make laws needed to carry into execution not only its powers but all powers which the Constitution vests in the Government.[256] The Act then seeks to impose limitations on the President's power as Commander in Chief in the following terms:

> The constitutional powers of the President as Commander in Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions or its armed forces.[257]

This language raises a host of problems. First, the Act purports to interpret and define the extent of the President's power as Commander in Chief. The Supreme Court and not the Congress, however, is the authorized interpreter of the Constitution. This statute is not a coordinate construction of the Constitution in which Congress attempts to define its power in a way not binding on other branches of government.[258] Contrary to Congress' assertion, the Act does not appear to be legislation which is necessary and proper to carry into execution the President's power as

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253. Veto of War Powers Resolution, 9 WEEKLY COMP OF PRES. DOC. 1286 (Oct. 24, 1973).
254. 119 CONG. REC. 36198, 36222 (1973).
255. U.S.C. § 1541 (1976). Former Under Secretary of State George Ball characterized one version (the Javits Bill) as "[a]n attempt to do what the Founding Fathers felt they were not wise enough to do. . . ." *War Powers Legislation, Hearings on S. 731, S.J. Res. 18 and S. J. Res. 59 Before the Senate Comm. on Foreign Relations*, Cong., 1st Sess. 621 (1972).
256. 50 U.S.C. § 1541 (b) (1976).
257. *Id.* at § 1541 (c).
258. In an 1802 Senate speech, Senator John Breckenridge (later U.S. Attorney General) noted:

> [T]he Constitution intended a separation of power vested in the three great departments, giving to each exclusive authority on the subjects committed to it. That these departments are coordinate, to revolve each within the sphere of their own

Commander in Chief; rather, it acts as a restriction on the exercise of such power. Such restrictions on constitutional authority must emanate from within the Constitution itself.[259]

Assuming *arguendo* that such a restriction on the President's role as Commander in Chief is a legitimate exercise of legislative power, the substantive language still poses problems. For example, the President would appear to be without authority to use the armed forces to protect American citizens abroad, a measure earlier described as a "privilege and immunity" granted by the fourteenth amendment. On this point, Senator Javits noted:

> There was a very long argument about including the concept of rescuing nationals. It was felt that whatever was specified on that score, in order to be conservative in respect of the President's power, would have to be so hedged and qualified that we were better off just not saying it, in view of the fact that it is a rather rare occurrence, and just leaving that open; and that is what we did.[260]

Moreover, Senator Javits maintained that whatever authority presidents had previously exercised in this regard had been an unconstitutional use of the Armed Forces. In reply to Senator Eagleton's observation that President Johnson's rescue of American nations in the Dominican Republic had been predicated on an emergency, Senator Javits responded:

> It may have been so predicated, but I do not think it was justified. Any President, so long as the Army, Navy, and Air Force will obey him can seek to assert authority which may not be justified under constitutional law. We could not help that even if we passed the Senate bill as the Conference Report. He would still do it.[261]

Overall, Senator Javits seems to be suggesting that Executive use of the military under these circumstances, even if not objected to by Congress, is technically unconstitutional. Such a position appears inconsistent with the avowed purpose of the Act to "fulfill the intent of the framers of the

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> orbits, with each being responsible for their own motion, and are not to direct or control the course of others. . . . That the construction of one department of the powers vested in it, is of higher authority than the construction of any other department; and that, in fact it is competent to that department to which powers are confined exclusively to decide upon the proper exercise of those powers. . . .
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> 11 ANNALS OF CONG. 179 (1802).

259. *Cf.* Reid V. Covert, 345 U.S. 1 (1957), wherein the Court held that the "necessary and proper" clause could not be used to subject civilian dependents to trial by court-martial because the guarantees in the fifth and sixth amendments of the Constitution placed limits on the scope of the "necessary and proper" clause.

260. 119 CONG. REC. 33558 (1973).

261. *Id.* at 33559.

Constitution." A more appropriate explanation, suggested by Senator Javits himself, deems such use of the Armed Forces as not amounting to an exercise of the war power.[262] That being the case, it would seem to be beyond Congress' regulatory power.

As the Act is presently worded, the President would also lack the authority to act in matters that involve the doctrine of humanitarian intervention. It is a principle of customary international law that a state may use force "for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice."[263] Several presidents have committed American forces either directly or indirectly to support humanitarian interventions, including the 1964 rescue of hostages in the Congo and the 1965 intervention in the Dominican Republic.[264] The restrictive language of the War Powers Act, however, would preclude the President from taking such action even though he found it to advance U.S. foreign policy objectives. Of course, consultation with Congress would authorize such an operation. This, however, is often impractical since, as with all military operations, speed and secrecy are often the keys to success.

The language that authorizes the President to use force in the event of a "national emergency created by attack upon the United States" raises interesting questions. For example, is an attack on a member of NATO also an attack on the United States in view of the language in the NATO treaty that "an armed attack against one or more of them . . . shall be considered an *attack* against them all. . . ."?[265] If not, the President could not use force to come to the aid of an ally under the limitations of the War Powers Act.[266] Section 8(a) of the Act addresses this issue and provides that:

> Authority to introduce United States Armed Forces . . . shall not be inferred— . . .
>
> (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of

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262. *Id.* at 33558.

263. E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921).

264. *See* Bogen, *The Law of Humanitarian Intervention: United States Policy in Cuba (1898) and the Dominican Republic (1965)*, 7 HARV. INT'L L. CLUB J. 297, 302 (1966); Note, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261, 261–62 (1972). *See generally* the material cited at note 342, *infra*.

265. *See* note 155, *supra*.

266. Professor Rostow notes that such an act would have precluded President Truman's actions in Korea without a congressional resolution. Rostow, *Great Cases Make Bad Laws: The War Powers Act*, 50 TEXAS L. REV. 833, 839 (1972). However, President Truman might have acted anyway and later sought congressional approval. L. Henkin, *supra* note 99, at 103.

> United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.[267]

This does not necessarily resolve the matter. Language in treaties such as the NATO treaty does not *imply* the possible use of United States Armed Forces; rather, such use is explicitly delineated and *required*. Secondly, this language effectively says that treaties are not self-executing. However, since "all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme law of the Land,"[268] treaties are generally considered self-executing in the United States unless the treaty expresses a contrary intent.[269] Moreover, if the President is in fact limited in his authority to use force, a Soviet advance into Germany, if carefully planned to avoid contact with American units, would not trigger a statutory justification for American intervention until Congress had a chance to debate the matter. Assuming the normal pace of congressional action (the House of Representatives did not act until several days after the evacuation of Saigon),[270] American treaty commitments could be viewed as little more than symbolic. In the final analysis, the President's constitutional duties of protecting the nation from attack and ensuring faithful execution of its laws seem to collide with the restrictions of the War Powers Act.

The language of the Act also poses problems concerning the definition of an "attack." If transporting missiles to and emplacing them in Cuba did not constitute an "attack" on the United States, then President Kennedy would have had to go to Congress for authority to establish the 1962 naval quarantine. Yet the delay caused by such debate—whether public or confidential—could easily have stripped the quarantine announcement of two of its key elements—surprise and decisiveness. A similar dilemma arises when a nuclear strike appears to be imminent. Must the President go to Congress since an attack has not yet occurred; or, alternatively, may the President take unilateral action to protect the nation even if war results?

Apart from constitutional issues, does the language of the War Powers Act concerning use of American military forces pursuant to a treaty have any operative effect on the President? This point was raised by Senator Eagleton during debate on the bill. In response to Senator Javits' assertion that every section of the bill was operative, Senator Eagleton replied:

> The Senator realizes, does he not, that it is an established legal

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267. 50 U.S.C. § 1547 (a) (1976).
268. U.S. CONST., art. IV, § 2.
269. E.g., *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).
270. Cruden, *supra* note 240, at 118–123.

> doctrine? I have one 'hornbook' here—I could quote the Senator a hundred—that a preamble or policy statement is: 'To supply reasons and explanations and not to confer power or determine rights. Hence it cannot be given the effect of enlarging the scope or effect of a statute.' Is that not pretty standard, garden variety legislative law?[271]

The State Department's position regarding the Act's language echoes Senator Eagleton—namely, that the wording is a "declaratory statement of policy . . . Section 2 does not contain language which requires or prohibits any particular action. . . ."[272]

To the extent that the Act does validly require action from the President, such action falls into three broad categories—consultation, reporting and termination.

The consultation requirement is succinctly set forth in one paragraph:

> The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after each such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.[273]

This part of the Act is plagued by definitional problems. The first difficulty involves the meaning of the phrase "consult with Congress." "Consulting" with a 535-member body is no small task and can be likened to the constitutional requirement that obliges the President to make treaties "by and with the Advice and Consent of the Senate."[274] However, no President since George Washington has sought the collective "advice" of the Senate. The first and only time that Washington sought to obtain the Senate's advice he was so outraged when the matter was committed to a committee that neither he nor any of his successors ever tried again.[275] Such a cumbersome process, unworkable when there were only 26 Senators, would most assuredly prove unmanageable with a 535-member Congress.

The President could, of course, advise Congress of his planned course of action and request a joint resolution authorizing the action. In fact, there

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271. 119 CONG. REC. 33559 (1973).
272. Letter from Department of State to Sen. Thomas F. Eagleton (Nov. 30, 1973); Cruden, *supra* note 240, at 80–81.
273. 50 U.S.C. § 1542 (1976).
274. U.S. CONST. art. II, § 2, cl. 2.
275. E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787–1957 (4th ed. 1957). However, some early presidents did seek the advice of the Senate by message. L. HENKIN, *supra* note 99, at 376, n.9.

have been five resolutions authorizing Presidential use of Armed Forces since the Korean Conflict.[276] However, the requirement to "consult" implies a dialogue that would be absent in such a procedure. The House Foreign Affairs Committee recognized this distinction and noted in a report that "for consultation to be meaningful the President himself must participate and all information relevant to the situation must be made available."[277] Finally, and most telling, the requirement to "consult" does not require that Congress approve a proposed course of action, but only that the President seek its advice.

It may be sufficient for the President to consult with leaders of Congress as a sounding board for that body's opinion of any proposed Executive action. Such a group would include the Speaker of the House, the President *Pro Tempore*, the Majority Leader of the Senate and the Minority Leaders of both houses as well as the Chairmen of the Armed Services, Foreign Relations, and International Relations Committees. Such leaders presumably would know and could voice the collective opinion of Congress. As a matter of fact, it was Presidential consultation with a similar group that may have averted the use of nuclear weapons in Indo-China in 1954.[278]

The House version of the bill required only consultation with "the leadership and appropriate committees of the Congress."[279] The Conference Committee later expanded this language to require consultation with Congress as a whole. The Committee's report simply noted, without meaningful explanation, that "[t]he conferees modified the House provision, to provide for consultation with the Congress."[280]

In any event, President Ford turned to a group of congressional leaders during the *Mayaguez* crisis rather than to the entire Congress.[281] The President's critics have not faulted him for dealing with the congressional leadership in lieu of the Congress itself. Instead, criticism focused on the fact that President Ford's "consultation" merely consisted of telephone calls made to various congressional leaders by members of the White

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276. The Formosa Resolution, Pub. L. No. 84–4, 69 Stat. 7 (1955); Middle East Resolution, Pub. L. No. 85–7, 71 Stat. 5 (1957); Cuban Resolution, Pub. L. No. 87–733, 76 Stat. 697 (1962); Berlin Resolution, H.R. Con. Res. 570, 76 Stat. 1429 (1962); Southeast Asia Resolution (Tonkin Gulf Resolution), Pub. L. No. 88–408, 78 Stat. 384 (1964).

277. H.R. REP. No. 287, 93rd Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2346, 2351.

278. Ehrlich, *The Legal Process in Foreign Affairs: Military Intervention—A Testing Case*, 27 STAN L. REV. 637, 650–51 (1975).

279. [1973] U.S. CODE CONG. & AD. NEWS 2346, 2350.

280. Conference Report No. 93–547, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2363, 2364.

281. 11 WEEKLY COMP. OF PRES. DOC. 511 (1975).

House staff informing congressional leaders of the President's course of action *after* the implementation of that action had already begun.[282]

The consultation requirement is not an absolute mandate; it is only required "in every possible instance." The legislative history of the Act does little to clarify this loose language. Although the House Committee report indicates that the word "every" should be interpreted inclusively, by inserting "possible" as a qualifier, the Act recognizes that some "dire" situations may require such "instantaneous action that no prior consultation will be possible."[283] Although the example of a "dire" situation envisioned by the House Committee is a hostile missile attack, a situation less cataclysmic would seem to permit the use of the Armed Forces without congressional involvement. In cases where action precedes consultation, the Congress does not waive its interest in continuing consultation. According to the Joint Committee report on the bill: "It is intended that consultation take place during hostilities even when advance consultation is not possible."[284]

The phrases "introducing United States Armed Forces into hostilities" and "situations where imminent involvement in hostilities is clearly indicated by the circumstances" raise additional issues concerning the use of naval forces. With respect to the former phrase, the House version contained the word "committing" rather than 'introducing." Unfortunately, there is no recorded explanation for the change in wording. Regarding the earlier version, the House Committee noted that a "commitment of armed forces commences when the President makes the final decision to act and issues orders putting that decision into effect."[285] This point in time is reached much earlier than when armed forces are actually introduced into hostilities.

With regard to naval forces, this distinction allows the President significantly greater flexibility in the decision-making process. Thus, if the President decided that an additional amphibious group with its Marines was needed to respond in a Mediterranean crisis, he could simply order reinforcements to the scene. On the other hand, had the triggering word remained "committing" instead of "introducing," the decision to act and the issuance of the movement order would have set into motion the consultation requirement. Significantly, the characteristics of naval forces and their ability to be committed without being introduced, permits them to be wielded by the President in crisis situations to further American foreign

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282. *See* Note, *The Recapture of the S.S. Mayaguez: Failure of the Consultation Clause of the War Powers Resolution*, 8 N.Y.U.J. INT'L L. & POL. 457 (1976).
283. [1973] U.S. CODE CONG. & AD. NEWS 2350.
284. *Id.* at 2364.
285. *Id.* at 2351.

policy aims without triggering the consultation requirment of the War Powers Act.

Because final consideration of the bill by both houses occurred shortly after deployment of the Sixth Fleet to the Eastern Mediterranean during the Yom Kippur War, the debates are replete with analysis of the use of naval forces and the consultation requirement. The general consensus was that the War Powers Act would not have limited or otherwise hamstrung the President's actions. More importantly, this was the view espoused by the principle architects of the bill—Jacob Javits in the Senate and Clement Zablocki in the House.

Countering an argument that "[t]he bill prevents 'show of force' and other mere deployments of troops or arms," Senator Javits responded:

> It was made absolutely clear during the debate last year and again is made clear in the Committee report this year that show-of-force deployments—for example, the movement of the 6th Fleet in the eastern Mediterranean during the 1970 Jordanian crisis—are not restricted by the bill unless and until they involve the Armed Forces in hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances. Should these latter conditions pertain, then, of course, "show of force" would be covered by the bill as that is the entire intention of the bill, which relates to involvement in hostilities.[286]

Senator Javits made this point again in addressing some objections concerning the President's authority to act in certain situations:

> [A]s to the deployment of the 6th Fleet in the 6-day war, the answer is precisely the same as that respecting the deployment in respect to the Berlin garrison. The President moved our ships forward in a situation which represented the normal deployment of naval forces of the United States. There was no imminent danger.[287]

During debate to overturn the President's veto of the War Powers Act, Javits also noted: "[T]o do what [the President] did, which is to move around the 6th Fleet or whatever else in the way of alert—that would not come within the 60-day provision of the bill."

Similar views were expressed during the House debate by Congressman Zablocki: "The President could, as he has, direct the 6th Fleet in the Mediterranean. The provisions of subsection 2(c) would not affect that

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286. 119 CONG. REC. 25054.
287. *Id.* at 25102.

action. The President is in this instance acting as Commander in Chief in deploying the Navy in international waters."[288]

The War Powers Act suggests several things about the President's authority to use naval forces to support foreign policy objectives. First, in the event of a crisis, the President may, without first consulting Congress, deploy naval forces to the crisis, provided that such forces remain in international waters. Whether labeled a show of force or a display of interest, such a reactive deployment would not reasonably be deemed a situation "where imminent involvement in hostilities is clearly indicated by the circumstances"—as long as such forces remain beyond the territorial limits of other nations. Two fundamental principles of international law require this result: freedom of the high seas and the prohibition against force contained in Article 2(4) of the United Nations Charter. Should such units come under attack, however, the President could then take action based upon section 2(c) of the War Powers Act which authorizes unilateral action in a national emergency.[289]

Has the Act caused any overall diminution in effectiveness of naval forces? Probably not. First, the Act is unlikely to receive the universal attention in the 1980's that it received in 1973 in the wake of Vietnam and in the midst of Watergate. Second, although there has been no massive commitment of American ground troops since passage of the Act, the Act did not hinder naval forces when they played a key role in the Southeast Asian evacuations and neither did it hinder the *Mayaguez* rescue. Finally, the proximity of naval forces to a crisis area suggests to the potential target state that such forces may be used for either of two reasons. One, the President may simply ignore the Act on the basis that it is inoperative for the reasons noted above. Alternatively, the requisite congressional consultation may occur, and the decision to commit naval units could be relayed almost instantaneously to on-scene forces. In short, the limitations imposed by the War Powers Act are neither so comprehensive nor so certain as to give decisionmakers in a potential target state any better capability than they had before to predict the use of American naval power.

The War Powers Act constrains the President in cases in which he considers actual commitment a necessity. Consultation is required in "every possible instance." Thus, when the President makes a good-faith decision that instantaneous action is required, prior consultation is not necessary. Even when consultation is appropriate, the President may

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288. *Id.* at 33863.

289. During the House debate, Congressman Fraser, a member of the Conference Committee noted:

> It is not enough that there simply be an attack on U.S. Armed Forces under that language. There is also the requirement that that constitutes a national emergency, so that an attack on some isolated naval unit or some patrolling unit in some part of

deploy forces beforehand. Then, if the "consultation" process does not dissuade him from action, he may then commit the forces already in place.

In the short run, the President has considerable freedom of action. In the long run, his judgment is subject to the sanctions of congressional and public opinion, the appropriations power, and ultimately, impeachment. Overall, the War Powers Act functions more as a wide-meshed net than as a boundary of precise dimensions. Thus far the Act has not had a significant impact on the use of naval forces in the implementation of foreign policy goals.

Section 4 of the Act imposes a reporting requirement on the President. In the absence of a declaration of war, the President must submit a report to the Speaker of the House and the President *pro tempore* of the Senate within 48 hours in any case in which U.S. Armed Forces are introduced:

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
> (2) into the territory, airspace or waters of a foreign nation while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. . . .

The report must set forth:

> (a) The circumstances necessitating the introduction of United States Armed Forces;
> (b) the constitutional and legislative authority under which such introduction took place; and
> (c) the estimated scope and duration of the hostilities or involvement. . . .[291]

The Act also requires the President to terminate such use of Armed Forces within 60 days unless Congress declares war, enacts authorizing legislation, extends the 60-day period, or is physically unable to meet due to an armed attack on the United States. The President may extend the 60-day period by an additional 30 days if he certifies in writing to the Congress that unavoidable military necessity requires the continued use of such Armed Forces in the course of safely extracting them from the scene of conflict. Finally, there is a provision that such forces shall be removed if

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the world, unless it created a national emergency, would not justify commitment by the President of our Armed Forces to hostilities.

119 CONG. REC. 33869 (1973).

290. 50 U.S.C. § 1543 (1976).

291. *Id.*

Congress so directs by concurrent resolution.[292] Although this provision gives Congress the power to countermand the President, it would be more likely that Congress would not act, thereby requiring removal of the forces at the end of two, or at the latest, three months.

In any case, the requirements of the Act have little direct impact on the use of naval force in their support of foreign policy. In the first place, the presence of naval forces adjacent to, but beyond, a target state's territorial waters, does not trigger the Act's consultation, reporting or withdrawal requirements. In most cases involving the introduction of naval forces into the territorial waters of another state, Congress—or at least its leadership—will have been consulted. Alternatively, where Congress is not consulted or is not in accord with the President's action, the 60-day limitation is unlikely to have a significant effect on the use of naval forces. Historically, operations involving only naval forces have tended to be relatively brief. Longer commitments of force usually involve ground forces instead of naval units. Thus, because of the nature of naval forces and the manner of their employment, neither the reporting nor the termination requirements of the War Powers Act are particularly significant.

## V. The United Nations Charter and the Use of Naval Forces as an Instrument of Foreign Policy.

In 1945, the United Nations was created "to save succeeding generations from the scourge of war."[293] One of the first articles of the UN Charter highlights this aspiration:

> All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. . . . All members shall refrain in their international relations from the *threat or use of force* against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purpose of the United Nations. . . .[294]

The use of force is not, however, totally proscribed. As Article 51 indicates: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." Taken together, these articles define the permissible uses of force in today's world.

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292. *Id.* § 1544(c).
293. U.N. Charter, Preamble.
294. *Id.* art. 2 (emphasis added). Professor Henkin contends that Article 2(4) is the principal norm of contemporary international law. L. Henkin, How Nations Behave 129 (1968).

To understand and appreciate the provisions of the UN Charter regarding force, one needs to know how international law dealt with the use of force prior to the U.N. Charter regime. Until the end of World War I, customary international law recognized war as a permissible relationship between states. This concept flowed from the sovereign equality of states and the absence of any central international authority. One noted English publicist wrote during World War I:

> As international law is destitute of any judicial or administrative machinery, it leaves states which think themselves aggrieved, and which have exhausted all peaceful methods of obtaining satisfaction, to extract redress for themselves by force. It thus recognizes war as a permitted mode of giving effect to its decisions.[295]

At about the same time another expert concluded that international law "does not object to States which are in conflict waging war upon each other instead of peacefully settling their differences."[296]

Since international law permitted states to resort to war, it is not surprising that lesser uses of military force were also tolerated. Forcible measures of self-help were considered to be "pacific" means of resolving disputes as distinguished from a state of war.[297]

Despite the force inherent in these so-called "pacific" measures, it was necessary under the international law of the time to

> draw a sharp line between these means and war. . . . [A]lthough they frequently consist of harmful measures, they are neither by the conflicting nor by other States considered as acts of war, and consequently all relations of peace such as diplomatic and commercial intercourse, the execution of treaties, and the like, remain undisturbed. Compulsive means are in theory and practice considered peaceful, although not amicable, means of settling international differences. It is, further, characteristic of compulsive means that they are at their worst confined to the application of certain harmful measures only, whereas belligerents in war may apply any amount and any kinds of force, with the exception only of those methods forbidden by International Law.[298]

Until the end of World War I, uses of force short of war, like war itself, were seldom regulated. One exception was the prohibition contained in the

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295. W. HALL, A TREATISE ON INTERNATIONAL LAW 61 (7th ed. 1917).
296. 2 L. OPPENHEIM, INTERNATIONAL LAW 60 (2d ed. 1912).
297. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 457 (1952). The author represented the British Government in the *Corfu Channel Case* referred to *infra* at text accompanying notes 312 through 319.
298. 2 L. OPPENHEIM, *supra* note 296, at 34–35.

1907 Hague Convention against the use of force to recover from one state debts owed the nationals of another state.[299] Beyond this, force as an instrument of foreign policy was generally accepted in the international context.

The Covenant of the League of Nations, which emerged from the peace settlement following World War I, represented a marked departure from the permissive approach to war. Article 12 of the Covenant provided that:

> The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision or the report by the Council.[300]

Thus, although the Covenant did not prohibit war, it did seek to establish an administrative firebreak consisting of both mediation and delay.

A major shortcoming of the Covenant was that its prohibitions were couched in terms which discouraged a "resort to war." As noted above, "war" had a precise, technical meaning. States circumvented the Covenant and engaged in armed hostilities, claiming that their conduct did not in fact amount to "war."[301]

In 1928, the United States and France drafted a general treaty for the renunciation of war. This treaty, negotiated outside the framework of the League of Nations, is also popularly known as the Pact of Paris or the Kellogg-Briand Pact and became binding on most nations during the period prior to World War II. The heart of the Kellogg-Briand Pact is succinctly set forth in two articles. Article I provides that "[t]he High Contracting Parties . . . condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another."[302] Article II goes on to declare that "[t]he High Contracting Parties agree that the settlement or solution of all disputes or conflicts . . . which may arise among them, shall never be sought except by pacific means."[303] As in the Covenant of the League of Nations, the Kellogg-Briand Pact merely precluded "recourse to war," not all use of force.[304] Disputes were to be resolved by "pacific means," a term which

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299. Hague Convention No. 2 of 18 Oct. 1907, 36 Stat. 2241, T.S. No. 537.
300. LEAGUE OF NATIONS COVENANT art. 12, para. 1 (emphasis added).
301. Waldock, *supra* note 297, at 471–72.
302. 46 Stat. 2343, T.S. No. 796, art. I.
303. *Id.* art. II.
304. *See* Lauterpacht, *The Legal Irrelevance of the "State of War,"* 62 AM. SOC'Y INT'L. L. PROC. 58, 62 (1968).

still permitted uses of armed force short of war.[305] It is not surprising that neither the Covenant nor the Kellogg-Briand Pact could restrain the hostilities that erupted into World War II. Against this background of futility, however, the drafters of the UN Charter expanded the prohibiting language of Article 2(4) to include both the "threat or use of force."

The original wording of Article 2(4) in the Dumbarton Oaks proposals declared that: "All Members of the Organization [the United Nations] shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purpose of the Organization."[306] According to commentators on the UN Charter, the later insertion after the word "force" of the descriptive phrase "against the territorial integrity or political independence of any state" was in response to demands by smaller states that the Charter should include a more specific guarantee of freedom from external coercion.[307] Curiously, the amended language closely resembles the League of Nations Covenant declaration that "[t]he Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League."[308] This declaration had been regarded as a mutual guarantee only against the ultimate loss of territory. The Covenant aimed at preventing an aggressor from retaining the fruits of aggression rather than preventing the use of force itself.[309]

The drafters of the UN Charter, however, had a broader purpose in mind—the outlawing of force except in limited, necessary circumstances. In commenting on a Norwegian-proposed amendment, a Committee on the Preamble, Purposes and Principles, concluded that:

> [T]he unilateral use of force or similar coercive measures is not authorized or admitted. The use of arms in legitimate self-defense remains admitted and unimpaired. The use of force, therefore, remains legitimate only to back up the decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains. The intention of the Norwegian amendment is thus covered by the present text.[310]

Notwithstanding the explicit limitations on the use of force contained in

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305. Waldock, *supra* note 297, at 475–76.
306. DEPARTMENT OF STATE, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATIONS, SELECTED DOCUMENTS 100 (1946) [hereinafter cited as UCIO DOCS].
307. L. GOODRICH & E. HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 103 (2d ed. 1949). For a listing of proposed amendments to Article 2(4), *see* UNCIO DOCS at 100–108.
308. LEAGUE OF NATIONS COVENANT art. 10.
309. Waldock, *supra* note 297, at 469–70.
310. Report of Rapporteur of Committee I/1 to Commission I in UNCIO DOCS 490, 498.

the Charter and the equally explicit *travaux preparatoires* of the Conference, the first 25 years of the United Nations' existence witnessed more than one hundred separate outbreaks of hostilities.[311] To what extent did the use of naval forces during the last few decades comport with the essential provisions of the Charter?

A starting point for this inquiry must be the Corfu Channel dispute, in which the International Court of Justice grappled with a state's use of force for the first, and thus far, last time. In May 1946, an Albanian shore battery fired upon two British cruisers, H.M.S. *Orion* and H.M.S. *Superb*, which were passing southward through the North Corfu Channel in Albanian territorial waters.[312] The British Government protested to the Albanian Government, contending that the right of innocent passage was a fundamental norm of international law. The Albanian Government contended that the right of innocent passage required prior notice to and approval by the Albanian Government. The exchange of diplomatic correspondence on the subject ended with the British warning that if coastal batteries again opened fire on a British warship passing through Corfu Channel, the fire would be returned.

The British Government later decided to send a naval force through the channel to see "whether the Albanian Government has learnt to behave themselves."[313] In October 1946, a British squadron consisting of two cruisers and two destroyers sailed from the port of Corfu, Greece, northward through the North Corfu Strait. As the ships passed through the Strait, the crews were at general quarters; the guns were loaded and remained in their normal cruising positions: main armament was trained fore and aft with anti-aircraft guns pointed skyward. Unknown to the British, after the May incident, the Albanian Government had had the channel mined. Two of the British ships passing through the strait that October struck mines, resulting in 86 British deaths or injuries.

His Majesty's Government did not appeal to the UN Security Council, believing that any proposal to sweep the channel to ascertain the source of the explosions would be blocked by a veto.[314] Instead, three weeks after the October incident, British minesweepers entered Albanian territorial waters under the protection of a powerful covering force and swept the

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311. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L. L. 809, 811 (1970).
312. The Corfu Channel Case, [1949] I.C.J. 4, 27.
313. *Id.*
314. Waldock, *supra* note 297, at 499.

channel.[315] The British Government then brought the matter before the Security Council which, after several months deliberation, recommended that the matter be referred to the International Court of Justice.

The court dealt with two issues relevant to the present discussion. First, the court had to consider whether the British squadron's conduct in October 1946 was consistent with the doctrine of innocent passage. Secondly, the court had to consider whether Great Britain's resort to self-help violated international law. Subsumed under each of the issues is the general question of whether British actions at any point encroached on Albania's sovereignty or territorial integrity.

Addressing the October incident, the Court opined that:

> States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal state to prohibit such passage through straits in time of peace.[316]

Albania argued that under the circumstances of the case the passage of the British warship was not innocent. Albania contended that the transit was a political mission, not innocent passage; that the crew was at general quarters, and that the purpose of the mission was intimidation. The Court seems to have agreed with several of the Albanian assertions and cited a British Admiralty telegram which revealed that the ships had been ordered through the strait more to test Albania's attitude than for purposes of navigational convenience. Nonetheless, in view of the overall circumstances, the court ultimately held that:

> The legality of this measure taken by the Government of the United Kingdom cannot be disputed, provided that it was carried out in a manner consistent with the requirements of international law. The "mission" was designed to affirm a right which had been unjustly denied.[317]

Referring to the size of the force involved, the court said:

> The intention must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that she would abstain from firing again to passing ships. Having regard, however, to all the circumstances of the case . . . the Court is unable to characterize

315. The Corfu Channel Case, [1949] I.C.J. at 33.
316. *Id.* at 28 (emphasis by the court).
317. *Id.* at 30.

> these measures taken by the United Kingdom authority as a violation of Albania's sovereignty.[318]

Turning to the question of self-help, the court rejected the British argument that the intervention was justifiable for purposes of investigation:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful states, and might easily lead to perverting the administration of international justice itself.[319]

Professor Claud Waldock, who served as a counsel representing the British Government, suggests in his analysis of the case that the court's decision is consonant with the UN Charter's text regarding use of force. First, he concludes that preparations for the use of force, in the event it should be necessary in self-defense, do not contravene Article 2(4) of the Charter.[320] Such a result could logically be reached without reference to the *Corfu Channel Case*. Article 2(4) prohibits the threat or use of force. Where the preparation to use force—such as a ship at general quarters—responds to a prior hostile act, there is no "threat" per se. Professor Waldock concludes with this significant point: "A threat and, indeed, use of force—the demonstration of naval force in Albania's territorial waters—is not contrary to Article 2(4) when it is in affirmation of rights which have been illegally and forcibly denied."[321] While the assessment is entirely consistent with the Court's opinion, it requires more explanation before qualifying as a general proposition of international law.

The court did not, *ipso facto*, validate the use of force to affirm rights which have illegally and forcibly denied. The legality of the British action was contingent on its execution "in a manner consistent with the requirements of international law." Article 2(4) of the UN Charter requires states to refrain from the threat or use of force in their international relations. Furthermore, coastal states must accord a foreign state's vessels the right of innocent passage through their territorial waters. Reciprocally, the manner of such passage must be innocent and peaceable.

Applying these rules to the present case, it follows that the British warships were operating "in a manner consistent with the requirements of

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318. *Id.* at 31.
319. *Id.* at 35.
320. Waldock, *supra* note 297, at 500.
321. *Id.*

international law." First, the ships were seeking to exercise their right of innocent passage through the strait. Although the crews stood at general quarters with guns loaded, the Court found a reasonable explanation for such conduct: prior hostile acts by the Albanian Government made it necessary that the British ships be able to respond quickly to any attack. Secondly, the British ships did not threaten to *employ* naval force as a means of enforcing their right of passage. Rather, the use of a powerful transit force was simply a *demonstration* that further unlawful attacks would be responded to in a manner authorized by Article 51.

Professor Waldock's formulation is consistent with the result reached in the *Corfu Channel Case*. If the factual situation were varied, Professor Waldock and the court might reach different conclusions. For example, if the British had used a carrier air strike to destroy the Albanian shore batteries before a second attempt at passage, Professor Waldock might find the attack legal since the British used force to secure a right that had been illegally and forcibly denied. On the other hand, it is doubtful that the court would deem such conduct "consistent with the requirements of international law" since Article 2(4) prohibits force except in self-defense.

Were the facts modified so that the British became aware of the minefield before attempting the second passage and thereupon threatened to destroy the capital city of Tirana if the mines were not removed, such coercive action would constitute a threat rather than a demonstration of naval power exercising rights guaranteed by Article 51. While Professor Waldock's formulation would legitimize such a threat of the use of force, the language employed by the court would not. A more appropriate formulation of the *Corfu Channel Case*'s central precept is that demonstrations of naval force, otherwise consistent with international law, do not violate Article 2(4). The phrase "otherwise consistent with international law" may relate either to the geographical area of the demonstration or to the circumstances and manner in which the naval muscles are flexed.

The 1958 Geneva Convention on the High Seas provides for both freedom of navigation and freedom of overflight over the high seas.[322] It also specifies that "[t]hese freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."[323]

Both British and American courts have had occasion to define the scope of general international law pertaining to the freedom of the high seas. In

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322. 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, *in force* Sept. 30, 1962, art. 1.
323. *Id.*

*Le Louis*,[324] a case involving condemnation of a ship engaged in the slave trade and which resisted search by a British crusier, Sir Walter Scott observed: "[t]wo principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all states . . . The second is that, all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation."[325] A few years later, in another case concerning the slave trade and the right of visitation and search,[326] Justice Story wrote: "Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all. . . . Every ship sails there with the unquestionable right of pursuing her lawful business, without interruption. . . ."[327] Still later, in a case involving a claim under the Submerged Lands Act[328] to ownership of lands, the Supreme Court observed that "the high seas, as distinguished from inland waters, are generally conceded by modern nations to be subject to the exclusive sovereignty of no nation."[329] These general principles of international law, and the specific freedoms contained in the Convention on the High Seas, form a juridical basis for demonstrations of naval force on the high seas.

Naval demonstrations may also be conducted in the territorial sea of another state, given the proper circumstances. The 1958 Convention on the Territorial Sea and the Contiguous Zone provides that "[t]he sovereignty of a state extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coasts, described as the territorial sea."[330] Since the dominion of the coastal state within its territorial sea involves sovereignty, other states are not free to send their vessels into such an area at will. Absent an invitation from the sovereign, the presence of naval vessels in the territorial sea of another state is limited to cases of innocent passage. In order for naval forces to meet the "consistent with the requirement of international law" test of the *Corfu Channel Case*, passage must conform to the rules of international law governing innocent passage. These rules are set forth in Article 14 of the Convention on the Territorial Sea and Contiguous Zone which establishes the following pertinent guidelines:

(1) . . . [S]hips of all states . . . shall enjoy the right of innocent passage through the territorial sea.

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324. 2 Dobs. 210, 165 Eng. Rep. 1464 (1817).
325. *Id.* at 1475.
326. The Mariana Flora, 24 U.S. (11 Wheat.) 1 (1826).
327. *Id.* at 41.
328. 43 U.S.C. §§ 1301–1315 (1976).
329. United States v. Louisiana, 363 U.S. 1, 33 (1960).
330. 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639, *in force* Sept. 10, 1964, art. 1.

(2) Passage means navigation through the territorial sea for the purpose either of traversing that sea without entering territorial waters, or of proceeding to internal waters, or of making for the high seas from internal waters.

(3) Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or by distress.

(4) Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with these articles and with other rules of international law. . . .

(5) Submarines are required to navigate on the surface and to show their flag.[331]

Thus, in order to meet the *Corfu Channel Case* test, a naval force may not linger within territorial waters. Additionally, the passage cannot be "prejudicial" to the peace, good order or security of the coastal state. Presumably, a demonstration force engaged in innocent passage should not be conducting drills or operations in the territorial sea. Not only might such operations appear hostile, they could pose a safety hazard to other shipping. These general precepts depend on the interplay of particular circumstances. In the *Corfu Channel Case*, the Court concluded that circumstances justified the transit through the straits at general quarters. Defensive prudence outweighed the appearance of hostility and the passage of the warships—at least from the British viewpoint—remained essentially "innocent."

Discussion has focused thus far on demonstrations of naval force consistent with the *Corfu Channel Case*'s affirmation of transit rights. Concerning the subsequent minesweeping incident, the Court condemned the British resort to self-help for purposes of investigation and collection of evidence. Significantly, the Court grounded its decision not on the fact that the British used force, but on the narrow ground that international law does not recognize any right of forcible self-help for purposes of investigation. Thus, the Court did not rule out the actual use of force provided that such use is otherwise consistent with international law.

What circumstances would permit a resort to force notwithstanding the express language of Article 2(4) of the United Nations Charter? The drafters of this Article were concerned to limit the unilateral use of

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331. *Id.*, art. 14.
332. *See* note 310, *supra*.

arms to legitimate cases of self-defense.[332] Collective activity by members of the United Nations would not be a unilateral resort to force since it would obey the preamble's requirement "that armed force shall not be used, save in the common interest. . . ." Moreover, such use of force accords with one of the aspirations set forth in Article 1: "to take effective collective measures for the prevention and removal of threats to the peace. . . ."[333] Such collective measures, however, are more of an obligation of United Nations' membership than an aspect of one state's foreign policy.[334]

A clear exception to Article 2(4) appears in Article 51:

> Nothing in the present charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.

Since the right to use unilateral force is inextricably tied to the doctrine of self-defense, the legal and historical scope of that doctrine holds the key to this portion of the analysis.

The drafting committee for the Purposes, Principles and Preamble of the Charter took pains to preserve the "use of arms in *legitimate* self-defense" (emphasis added). More than a century earlier, Secretary of State Daniel Webster set forth what was to be the generally accepted formulation of self-defense as a precept of international law in the *Caroline Case*. In 1837, the *Caroline*, a vessel anchored in American waters, was being used to conduct raids into Canada. A party of Canadians landed in the United States and burned the *Caroline*. In reply to a British note justifying the raid on the basis of self-defense, Secretary of State Webster acknowledged the existence of the doctrine but held that any necessity compelling the resort to self-defense had to be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[335] Although the requirement of necessity may not be as stringent as Secretary Webster's formulation,[336] clearly the reason for the use of force in self-defense must be compelling.

Article 51 of the UN Charter acknowledges the "inherent" right of self-defense—the right as it exists in customary international law. Article 51 clearly authorizes the defense of territory since a state's territorial

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333. Article 2 provides that if the Security Council considers force the only remedy to effect its decisions in the face of an act of aggression or a threatened breach of the peace, the Council "[m]ay take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."

334. Article 2(5) provides that "[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter. . . ."

335. 2 J. MOORE, *supra* note 162, at 413.

336. Mallison, *supra* note 14, at 348.

integrity is a *sine qua non* of sovereignty.[337] Self-defense also includes the right to defend a state's nationals outside its boundaries. Even though the Charter limits self-defense to cases where an "armed attack occurs," international practice has tolerated the use of armed forces to protect citizens in imminent danger where the host state could not or would not protect them. The Israeli raid to free hostages aboard a hijacked airliner at Entebbe Airport, Uganda, is a dramatic illustration of this concept.[338]

The doctrine of humanitarian intervention or, "the reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice,"[339] suggests another permissible use of force. Two examples of post-Charter interventions justifiable on grounds of humanitarian intervention were the 1964 Belgian rescue of approximately 1,300 hostages held by an insurgent group[340] and the Indian incursion into Pakistan that resulted in the creation of the independent state of Bangladesh.[341] Although support for this doctrine is not universal, it is usually recognized as an exception to the prohibitions of Article 2(4).[342]

The uses of armed force cited above are generally considered to be the only uses acceptable within the limits of Article 2(4). Consequently, many of the uses of naval forces previously described would not be permitted under the Charter. For example, Article 2(4) would have prohibited the reprisal against citizens of Greytown, Nicaragua.[343] Arguably, there would have been no violation of Article 2(4) since the use of force was not against "the political independence or territorial integrity" of Greytown; a similar

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337. *See* Convention On Rights and Duties of States, Dec. 26, 1933, art. 3, 49 Stat. 3097, T.S. No. 881.
338. Note, *Use of Force for the Protection of Nationals Abroad: The Entebbe Incident*, 9 CASE W. RES. J. INT'L L. 117 (1977).
339. E. STOWELL, INTERVENTION IN INTERNATIONAL LAW 53 (1921) (footnote omitted).
340. Note, *The Congo Crisis 1964: A Case Study in Humanitarian Intervention*, 12 VA. J. INT'L L. 261 (1972). The events in the Congo were discussed in the United Nations Security Council. Positions ranged from complete approval to total disapproval. Only the United Arab Republic and Libya completely rejected the concept of humanitarian intervention. 19 U.N. SCOR (1174th mtg.) at 2–5, U.N. Doc. S/P.V. 1174 (1964).
341. INTERNATIONAL COMMITTEE OF JURISTS, EAST PAKISTAN STAFF STUDY 62 (1972). Note that neither the Security Council Resolution (U.N. Doc. S/Res/307 (1971) nor the General Assembly Resolution (U.N. Doc. A/Res/2793 (XXVI) (1971) ) condemned India's intervention or called on India to withdraw her forces.
342. *E.g.*, Behuniak, *The Law of Unilateral Humanitarian Intervention in International Law*, 79 MIL. L. REV. 157 (1978); Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT'L L. J. 203 (1974); Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L. J. 205 (1969).
343. *See also* Hague Convention No. IX of 18 Oct. 1907, 36 Stat. 2351, T.I.A.S. No. 542,

argument, however, was made by the British and rejected in the *Corfu Channel Case*.

The UN Charter would certainly have prohibited the way American naval forces were used during the revolution in Panama and the occupation of Vera Cruz. Perry's visit to Japan and the presence of naval forces at Santo Domingo pose closer questions. In neither case did naval forces present an overt threat. The mere display of power in a manner otherwise consistent with international law, whether on the high seas or in another state's territorial waters, whether by consent of the state or in the exercise of the right of innocent passage, would not seem to violate Article 2(4). Overall, the *Corfu Channel Case* appears to validate such use.

In summary, the United Nations Charter imposes limits on how naval forces may be used to support foreign policy objectives. The Charter specifically prohibits force or the threat of force except in individual or collective self-defense or for humanitarian reasons. However, the Charter does not preclude demonstrations of naval force carried out in accordance with international law. Thus, there is an intimate, organic relationship between the international law of the sea and the use of naval forces in the foreign policy arena.

## VI. The Evolving Law of the Sea Regime and Its Impact on the Use of Naval Forces.

The law of the sea, particularly the rules governing the breadth of the territorial sea and the doctrine of innocent passage, clearly constrain the use of naval forces as an instrument of foreign policy. During recent years, as nations reexamined traditional legal principles, the network of rules and precepts which constrain the use of naval forces has been in a state of relative flux.

For approximately 350 years, the cardinal principle around which ocean law evolved was the notion of "freedom of the seas." This idea, first articulated by Hugo Grotius in 1609 in his seminal treatise *Mare Liberum*,[344] was based on his perceptions of "divine justice" and a conviction that the sea was not susceptible to physical appropriation. Grotius' writing, although supposedly an academic inquiry into juridical aspects of the sea, was intended to support the right of the Dutch to participate in the East Indian trade and their right to use the seas as highways for commerce and communication.[345] Despite some initial opposition to the principles

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which prohibits the bombardment by naval forces of undefended towns, villages, dwellings or buildings.

344. H. Grotius, The Freedom of the Seas (R. Magoffin, trans. 1916).

345. H. Knight, The Law of the Sea: Cases, Documents and Readings 15 (1978). *See also* T. Fulton, The Sovereignty of the Sea 338–39 (1911).

enunciated by Grotius,[346] freedom of the seas became a norm of international law.[347] Widespread acceptance was due in large measure to the fact that such a principle generally favored European nations with extensive commercial interests—the very nations which formulated "customary" international law. The Convention on the High Seas now codifies the customary international law principle of freedom of the seas. The Convention enumerates four specific rights:

(1) freedom of navigation;
(2) freedom of fishing;
(3) freedom to lay submarine cables and pipelines; and
(4) freedom to fly over the high seas.

The Convention further specifies that "[t]hese freedoms, and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas."[348]

Notwithstanding the concept of freedom of the seas, international law has customarily recognized that a coastal state is entitled to exercise sovereignty over a limited band of water known as the territorial sea. The basis for this authority was the sovereign's right to protect against attack and to protect the country's health, revenues and industries.[349] The notion that the territorial sea includes sovereignty is now embodied in the Convention on the Territorial Sea and the Contiguous Zone, which provides that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."[350]

Although all nations subscribe to the concept of a territorial sea, there is substantial disagreement regarding its breadth. Historically, suggestions as to the extent of a state's jurisdiction included such diverse distances as 100 miles, the range of vision on a fair day, or to mid-channel.[351]

At the beginning of the eighteenth century, a Dutch publicist, Cornelius van Bynkershoek, suggested that the proper breadth of the territorial sea should be the distance of a cannon shot—the area of sea controllable from

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346. The principal opposition came from the English writers. WILLIAM WELWOOD, ABRIDGEMENT OF ALL THE SEA-LAWES (1613); JOHN SELDEN, MARE CLAUSUM SEU DE DOMINO MARIS (1635). These writers were concerned that Grotius' work was an attack on certain exclusive fishing grounds adjacent to the English coast. *See generally* H. KNIGHT, *supra note 345, at 27–32.*
347. See text accompanying notes 325–331, *supra*.
348. 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, *in force* Sept. 30, 1962.
349. P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION 5 (1927).
350. 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639, *in force* Sept. 10, 1964, art. 1.
351. *See generally* T. FULTON, *supra* note 345, at 538–39.

land.[352] This rule of thumb eventually evolved into a standard of three miles, or one marine league.[353] During the nineteenth century the three-mile limit became widely recognized; only Spain and a few Scandinavian states claimed a broader territorial sea.[354]

The near universal acceptance of the 3-mile limit survived intact until the end of World War II. Then, in September 1945, President Truman proclaimed that the continental shelf adjacent to the United States was subject to the jurisdiction and control of the United States.[355] Although the President was careful to emphasize that "[t]he character of high seas on the Waters above the Continental Shelf and the right to their free and unimpeded navigation are in no way thus affected,"[356] several Latin American nations followed by proclaiming a 200-mile territorial sea. Thus began the unraveling of the consensus for a 3-mile outer limit on the territorial sea.[357] By the 1958 Geneva Conference on the Law of the Sea, more than one-third of the coastal states claimed territorial seas in excess of 3 miles. Ten states claimed 6 miles, one state 9 miles, one state 10 miles, ten states 12 miles, and five states up to 200 miles.[358]

In the 1951 *Anglo-Norwegian Fisheries Case*, the International Court of Justice held that determination of the breadth of the territorial sea was a matter of municipal law, although the validity of such determination was to be measured by international law.[359] Unfortunately, the 1958 Geneva Conference on the Law of the Sea was unable to formulate an international legal standard for the breadth of the territorial sea. According to the International Law Commission, however, international law would not permit extension of the territorial sea beyond 12 miles.[360]

Despite the position adopted by the International Law Commission, further uncertainty concerning the breadth of the territorial sea arose in

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352. C. VAN BYNKERSHOEK, DE DOMINIO MARIS DISSERTATIO 44 (CLASSICS OF INTERNATIONAL LAW, ed. R. Magoffin, trans. 1923).
353. There is dispute whether or not the cannon shot rule evolved into the three-mile rule. *E.g.*, Walker, *Territorial Waters: The Cannon Shot Rule*, 22 BRIT. Y.B. INT'L L. 210 (1945). Secretary of State Thomas Jefferson seems to have treated the two as synonymous in claiming a three-mile limit for the United States. *See* Letter from Secretary of State T. Jefferson to British Minister, Nov. 8, 1793 in 1 J. MOORE, *supra* note 162, at 702–03.
354. Heinzen, *The Three Mile Limit: Preserving the Freedom of the Seas*, 11 STANFORD L. REV. 597, 630 (1959).
355. Pres. Proc. No. 2667, 10 Fed. Reg. 12303 (1945).
356. *Id.*
357. R. OSGOOD, A. HOLLICK, C. PEARSON & J. ORR, TOWARD A NATIONAL OCEAN POLICY: 1976 AND BEYOND 20 (1975) [hereinafter cited as OSGOOD].
358. Heinzen, *supra* note 354, at 641–44.
359. [1951] I.C.J. 3, 132.
360. International Law Commission, Commentary Draft Article 3 (1956), *reprinted in* H. KNIGHT, *supra* note 345, at 313.

the wake of two concurrent, although unrelated, phenomena. The first phenomenon was the crumbling of European colonial empires and the creation of a large number of independent nations in Africa and Asia. These new nations were increasingly concerned with the allocation of global resources and began to reject—or at least to question—the norms of customary international law—including the law of the sea—that had been formulated by their former rulers in support of colonial interests. Secondly, modern technology held out the promise of harvesting vast resources from the ocean never before dreamed possible. Thus, the breadth of a state's territorial sea became linked directly with the general issues of national development and resource control. Spurred by these interests, claims to territorial seas continued to proliferate so that at present more than three times as many states claim a 12-mile than a 3-mile territorial sea.[361] Arguably, a 12-mile limit has now ripened into customary international law.[362]

The Third United Nations Conference on the Law of the Sea, in its recently adopted Convention on the Law of the Sea has accepted a twelve-mile limit as the maximum permissible territorial sea.[363] The President of the United States announced in July 1982 that the United States considered that the non-seabeds provisions of the treaty including the navigational articles—were largely satisfactory and protective of U.S. interests.[364] However, in light of the unsatisfactory seabed mining regime, the United States would not sign the Convention. The discussion that follows is premised not on U.S. signature of the Convention—which is certainly unlikely in the near term—but, on the assumption that the Convention will be widely accepted, or at least widely cited as justification for claims to competence in certain maritime areas.

The increase in the territorial sea from 3 to 12 miles means a substantial

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361. There are 80 states claiming a twelve-mile territorial sea and only 22 states claiming a three-mile territorial sea. The next most prevalent claim is a 200-mile territorial sea, with fourteen adherents. U.S. Department of State, Office of the Geographer ltr of 9 April 1981.

362. *E.g.*, M. JANIS, SEA POWER AND THE LAW OF THE SEA 17 (1976). The only "major powers" among the states claiming a three-mile territorial sea are Australia, the Federal Republic of Germany, the United Kingdom and the United States. According to one leading expert in international law, in determining whether a rule of customary international law exists "one must ask how many states follow the practice, which states these are, whether they follow it because of a feeling of obligation to do so, and whether there is any competing or contrary practice." W. BISHOP, INTERNATIONAL LAW CASES AND MATERIALS 33 (1971).

363. U.N. Doc. A/Conf. 62/L.78 of 28 Aug. 1981.

364. 18 Weekly Compilation of Presidential Documents 887 (1982).

reduction in the world's ocean areas which are part of the high seas.[365] This 9-mile increase in the territorial sea does not, however, pose a significant obstacle to the employment of naval forces since any increase in sailing time from the point of hovering in international waters to the coastline of the target state would be less than an hour.

The fourfold increase in the breadth of the territorial sea will, of course, affect the psychological impact arising from the visual presence of naval forces. Naval units at 12 miles are visible only to the few with specialized equipment. Although a local revolutionary or insurgent may with his own eyes see ships on the horizon at 3 miles and feel that his cause enjoys the support of a powerful ally, the same visual sense of support is unlikely to exist when ships are reduced to blips on a radar screen. Thus, only the government in power, which could invite these naval forces for a port visit, may derive any significant benefit from the visual impact of naval forces under a 12-mile territorial sea regime.

A second impact of expanding the territorial sea to 12 miles is the closure of 116 straits to international navigation, except in innocent passage, where opposite coasts are less than 24 miles apart.[366] Absent some agreement to permit transit passage through these vital chokepoints, large and politically important areas such as the Mediterranean could be rendered inaccessible to U.S. naval forces. Although an argument can be made that technological advances—particularly in the range and accuracy of submarine-launched ballistic missles—would render the denial of passage unimportant with regard to American strategic posture,[367] this same argument is not persuasive with respect to the political uses of force. The effectiveness of naval forces in their political and/or psychological role depends on their proximity to the target state.

Just as the concept of the territorial sea constitutes an exception to the norm of freedom of the seas, a right to transit through the territorial sea is an exception to the complete sovereignty of the coastal state over its territorial waters. This exception is the "right of innocent passage," discussed earlier.[368] During the recent law of the sea negotiations, however, the United States' position has been that the traditional right of innocent passage as set forth in the Territorial Sea Convention does not, standing

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365. Arthur Dean, Chairman of the U.S. Delegation to the 1958 U.N. Conference on the Law of the Sea, reports that an increase of the territorial sea to twelve miles would decrease the area of the high seas by 2,500,000 square miles—an area about the size of the United States. Dean, *The Law of the Sea*, 38 DEP'T STATE BULL. 574, 578 (1958).
366. Department of Defense Press Release (Feb. 25, 1970), *reprinted in* H. KNIGHT, *supra* note 345, at 332.
367. OSGOOD, *supra* note 357, at 45–52.
368. See text accompanying note 348, *supra*.

alone, for the reasons set forth below, adequately guarantee the historic right of straits transit.[369]

Since innocent passage includes only actions not prejudicial to the "peace, good order or security of the coastal state," some states might subjectively determine that certain types of passage were not, in fact, innocent. For example, if under a 12-mile territorial sea regime, the Straits of Hormuz become part of Iran's territorial waters, Iran might determine that an American naval deployment to the Persian Gulf in support of one sheik or another was contrary to Iran's interests and therefore contrary to Iran's "peace, good order or security." In such a case, Iran could point to Article 16 of the Territorial Sea Convention for authority to "take the necessary steps in its territorial sea to prevent passage which is not innocent." The net result would be that Iran could control access into the Persian Gulf. Similar results could occur in many other strategic areas. In addition, innocent passage does not include a right of overflight since there is no right to overfly a state's territory.[370] And finally, innocent passage requires that submarines navigate on the surface.

In order to meet these objections and thus reach general agreement on a 12-mile territorial sea, the new Convention provides for a regime known as "transit passage," that would apply to "straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone."[371] Although this is a so-called "new" regime, transit passage is simply a new manner of describing the historic right to transit through, over, and under straits used for international navigation. The essence of "transit passage" is found in articles 38 and 39 of the new Convention. Article 38 provides in pertinent part:

1. . . . [A]ll ships and aircraft enjoy the right of transit passage, which shall not be impeded. . . .
2. Transit passage is the exercise . . . of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. . . .

Article 39 provides for certain administrative duties for ships and aircraft while exercising the right of transit passage, and also provides that they shall:

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369. Stevenson and Oxman, *The Preparations for the Law of the Sea Conference*, 68 AM. J. INT'L L. 1, 109 (1974).
370. Convention on International Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."
371. DCLOS, *supra* note 364, art. 37.

(a) Proceed without delay through or over the strait.
(b) Refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering straits, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations.
(c) Refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress.

From a straits closure perspective, the provisions of the new Convention mitigate almost entirely all adverse impacts that flow from the 12-mile limit on the use of American naval forces for foreign policy purposes. With respect to target states that do not border on the strait, a third state bordering on the strait could not, on the pretext of her own "peace, good order or security," prevent the passage of naval forces through the strait to such a target state. Where the strait state is also the target state, again a 12-mile territorial sea will have little impact under the transit passage regime. The basic security guarantee contained in the Convention, namely that a vessel refrain from any threat or use of force against states bordering the strait, already appears in the United Nations Charter.[372] Although transit passage would reaffirm the right to transit through the strait, vessels would be required to "proceed without delay. . . ." The message to be conveyed by such a force would, in most cases, however, be conveyed just as effectively by a naval force passing through the strait as by one lingering there.[373]

Consequently, neither the evolving law of the sea regime (which arguably now includes a 12-mile territorial sea as customary international law), nor the Third United Nations Law of the Sea Conference, is likely to have a drastic impact on the use of naval forces for foreign policy purposes. Although the use of such forces to support a group not yet in power may be diminished by the reduced visual impact at 12 miles, their other functions will not be significantly hampered. The presence of naval forces at 12 miles can still be used to display resolve or determination to a government looking on through high-powered binoculars or radar.

On the other hand, the concept of "creeping jurisdiction" presents a real threat to the use of naval forces. The various jurisdictional competences within the 200-mile exclusive economic zone, such as control over fishing, mineral resources, and pollution, may later ripen into claims of

372. U.N. CHARTER, art. 51.
373. Less than a month after the Indonesian Government announced its archipelagic doctrine claiming international straits as part of its territorial waters, U.S. Destroyer Division 31 passed through the straits of Lombok and Makassar to reaffirm the U.S. right of innocent passage. OSGOOD, *supra* note 357, at 59.

sovereignty.[374] If a 200-mile territorial sea were ever to become a norm of international law, the foreign policy uses of naval forces would certainly be emasculated. For, if a naval force at twelve miles were deemed remote, at 200 miles it would be considered absent. The specter of "creeping jurisdiction" will become far less menacing, however, if a comprehensive treaty which clearly fixes the limits of *sovereignty* at twelve miles is ultimately adopted.

## VII. Conclusion.

The records of the Constitutional Convention are uninformative regarding the permissible scope of the naval power. The public debate over ratification of the Constitution does, however, provide some insight into the Framers' intended uses of a navy. Chief among these intended uses are self-defense and the protection of American commercial interests. In creating a Department of the Navy, Congress authorized its Secretary to carry out orders from the President concerning the employment of naval vessels. Although Congress did not place any restrictions on the President's power to deploy naval forces, the enabling legislation suggests that Congress intended its vessels to be used for the protection of commerce. Despite this constitutional and legislative background, there can be little doubt that the Navy has, during the past two centuries, also been used extensively as an instrument of American foreign policy. Such a use appears to be clearly authorized in light of the principles enunciated in *McCulloch v. Maryland*. Significantly, there has been no recorded judicial or legislative challenge concerning the basic propriety of so using U.S. naval forces.

What is controversial, however, and what has been challenged, is the question of which branch of the Government is entitled to direct the foreign policy use of naval forces. This question becomes all the more sensitive where the use of naval forces could lead ultimately to war. The cryptic and somewhat conflicting pronouncements of the Constitution on this critical problem of control of naval forces make attempts at explanation exceedingly difficult. This difficulty is compounded by the fact that the use of naval forces for foreign policy purposes does not flow from the exercise of one enumerated power but rather is a blend of constitutional authority. This intricate mixture of competing claims to authority defies exact resolution and permits no definitive answer.

Actual practice of the past two hundred years demonstrates that the Executive has been given wide latitude to employ the Navy in any manner calculated to carry out the foreign policy interests of the country. Such use of naval forces has ranged from routine deployments to simply show the

374. E.g., M. Janis, *supra* note 362, at 7-8.

flag, to furtherance of a revolution, and even on occasion to the discharge of weapons. Although there have been numerous legislative protests concerning particular uses, Congress as a whole has never chosen to condemn the Executive's free hand in this regard. The Presidential prerogative to wield the Navy has existed so long that it has acquired the imprimatur of Constitutional legitimacy.

In general terms, Congress' powers of appropriation and regulation provide it with two powerful weapons for controlling Executive use of the military. Control over expenditures, although potentially the sharper edge of this two-edged sword, has seldom been invoked to curb Executive handling of naval forces. To the extent that Congress has used its power to make regulations for the Navy, such use has been primarily oriented toward administration and personnel. Finally, Congress' attempt to solidify and implement its authority over the use of the Armed Forces via the War Powers Act remains constitutionally questionable. Even assuming the constitutional validity of the Act, it poses a relatively insubstantial obstacle to the use of naval forces. Although the use of land-based forces has been severely circumscribed by the Act, a President may be able to comply fully with its provisions and also continue to employ naval forces as before.

Turning from the domestic to the international sphere, the biggest obstacle to the use of naval forces is Article 2(4) of the United Nations Charter, which prohibits the use or threat of force. This Article clearly precludes many forms of naval diplomacy practiced in the past. However, several exceptions to Article 2(4) permit the continued use of force to support foreign policy objectives. Among these are defense of another state, protection of nationals overseas, and humanitarian intervention. Moreover, Article 2(4) does not preclude demonstrations of naval force in support of foreign policy. Such uses, where otherwise in accordance with international law, are clearly validated by the *Corfu Channel Case*.

With regard to the international law of the sea, two main parameters affect the foreign policy use of naval forces—the breadth of the territorial sea and the right of passage through another state's territorial waters. Both issues were considered by the recently concluded Third United Nations Conference on the Law of the Sea—during which a consensus formed in support of a 12-mile territorial sea. Recognition of a 12-mile limit by the United States would probably have little impact on the foreign policy use of naval forces except for the potential closure of many international straits. However, provisions contained in the Convention regarding the regime of transit passage are designed to preserve the historic right of straits passage. In fact, the concept of transit passage may, in practice, actually lessen a coastal state's ability to impede another state's naval vessels from traversing its territorial waters.

From its creation, the United States Navy has seen extensive service as an instrument of American foreign policy. Since 1946, the Navy has been

involved in 80% of all political uses of American armed force. Evidence suggests that in the future such a role will expand. The potential use of naval forces as an element of future American foreign policy will largely be determined by three factors. First is the so-called "Nixon doctrine" in which American interests abroad are more narrowly defined, with a concomitant draw down in our overseas forces. This will often require that forces supporting our foreign policy will have to be dispatched to the area in conflict. A second factor is the War Powers Act, which hampers Executive use of land-based forces while having little impact on the traditional methods by which naval forces have been employed for political purposes since World War II. Finally, the evolution of the law of the sea should have no substantial effect on the political uses of United States naval forces. Taken together, these factors portend an expanding role for the use of naval forces as an instrument of foreign policy, a role that is consistent with both U.S. municipal law and contemporary norms of international law.